



universität
wien

DIPLOMARBEIT

Titel der Diplomarbeit:

“A GLOBAL SYSTEM OF JUSTICE?
THE INTERNATIONAL CRIMINAL COURT
OR
UNIVERSAL JURISDICTION.

A comparative study of two approaches to hold jurisdiction over human rights violations”

Verfasserin

Mag. Alice Wurmböck

angestrebter akademischer Grad

Magistra (Mag.)

Wien, 2012

Studienkennzahl lt. Studienblatt: A 057 390

Studienrichtung lt. Studienblatt: Internationale Entwicklung

Betreuer: Univ. Prof. Dr. Manfred Nowak, LL.M.

Eidesstattliche Erklärung

Hiermit versichere ich an Eides statt, dass ich die vorliegende

Diplomarbeit

“A GLOBAL SYSTEM OF JUSTICE?

THE INTERNATIONAL CRIMINAL COURT

OR

UNIVERSAL JURISDICTION.

A comparative study of two approaches to hold jurisdiction over human
rights violations”

ohne fremde Hilfe und ohne Benutzung anderer als der angegebenen Quellen und
Hilfsmittel angefertigt und die den benutzten Quellen wörtlich oder inhaltlich
entnommenen Stellen als solche kenntlich gemacht habe.

Diese Arbeit wurde in gleicher oder ähnlicher Form noch bei keiner anderen Prüferin/
keinem anderen Prüfer als Prüfungsleistung eingereicht.

Acknowledgements

Firstly, I would like to thank my supervisor, Univ. Prof. Dr. Manfred Nowak, LL.M., for his willingness to supervise this thesis. Mr. Nowak's academic as well as practical experience as former UN Special Rapporteur on Torture helped me to understand the international criminal law regime and made me eager to work in such a field. I would also like to thank the Ludwig Boltzmann Institute for Human Rights for inspiring me at university with various international law topics. Especially Julia Kozma was always a great inspiration during my studies of law and an excellent supervisor during my internship with the Institute. Always supporting my enthusiasm for various issues, my idea to write about this topic is the result of a discussion with her.

Mostly, I am very much indebted to my friends and my family. They have always been the greatest support and encouraged me in every phase of my thesis process. I cannot express my gratitude enough for all they have done for me. Without them neither my studies nor my thesis would have been possible.

Table of Content

1	Introduction	1
1.1	Relevance to international development	1
1.2	Scope of the study	1
1.3	Research questions	2
1.4	Methodology	2
1.4.1	Analytical.....	2
1.4.2	Qualitative	3
1.5	Chapter outline	3
2	Introduction to international criminal law	4
2.1	International law.....	4
2.1.1	Sources of international law.....	4
2.2	International criminal law	6
2.3	Explanation of legal terms	7
2.3.1	Principles of international criminal law.....	7
2.4	International crimes	9
2.5	Customary international law	11
2.6	Principles of jurisdiction	11
2.7	International cooperation and judicial assistance.....	12
2.7.1	Interpol.....	12
2.7.2	Europol.....	13
3	The International Criminal Court.....	14
3.1	History of the International Criminal Court.....	14
3.2	Member states of the International Criminal Court.....	16
3.3	The organization and the work of the International Criminal Court	18
3.3.1	Structure and organs of the International Criminal Court	18
3.4	Jurisdiction and admissibility	21
3.4.1	Jurisdiction <i>ratione temporis</i>	24
3.4.2	Jurisdiction <i>ratione personae</i>	24
3.4.3	Jurisdiction <i>ratione materiae</i>	25
3.4.4	Initiation of investigations and prosecutions	29
3.5	Financing of the International Criminal Court	31
3.6	Investigations and cases	32
3.7	The ICC and Africa – the allegation of being a neo colonialist institution	33
3.7.1	Investigations and prosecutions by the ICC in Africa	34

3.7.2	Reasons of the disproportional focus of investigation in Africa	38
3.7.3	Failure of investigations in other countries	39
3.8	The correlations between the United Nations Security Council and the International Criminal Court	40
3.9	The International Criminal Court's contribution to peace and security	41
3.9.1	Conclusion	42
4	The case of Omar Al-Bashir before the ICC	44
4.1	The conflict in Sudan (Darfur)	44
4.2	Reasons leading to the escalation of the conflict	46
4.3	The United Nations first attempts to solve the conflict in Sudan in 2004	47
4.4	The assignment of the situation in Darfur to the International Criminal Court with the Security Council Resolution 1593	49
4.4.1	Background to the Resolution 1593	49
4.4.2	Problems of the Resolution 1593	50
4.4.3	The cooperation requirement in Resolution 1593	51
4.4.4	The legal consequence of Resolution 1593	51
4.5	The arrest warrant of Omar Al Bashir	51
4.5.1	Problems of the indictments	53
4.6	Status of the case today	54
4.7	Conclusion	54
5	The International Criminal Tribunal for Rwanda as a pioneer to the International Criminal Court	56
5.1	Differences between the ICTR and the ICC	56
5.2	The Rwanda conflict	57
5.2.1	The history of the conflict of Rwanda	57
5.2.2	The international community in the conflict	58
5.3	The International Criminal Tribunal for Rwanda	58
5.3.1	The establishment of the ICTR	59
5.3.2	The jurisdiction of the ICTR	59
5.3.3	Rwanda and the rejection of Security Council Resolution 955	60
5.3.4	International cooperation with the tribunal	61
5.4	Examination of two successful cases of the ICTR	62
5.4.1	The Akayesu case	62
5.4.2	The Kambanda Case	64
5.5	Relevance of the ICTR for peace and justice	65
5.6	Conclusion	66
6	The principle of universal jurisdiction	68

6.1	History of universal jurisdiction	68
6.1.1	The Adolf Eichmann case	68
6.1.2	The Augusto Pinochet case	69
6.2	The concept of universal jurisdiction	69
6.2.1	Scope of the application of universal jurisdiction	70
6.2.2	What makes an offense applicable to universal jurisdiction?	73
6.2.3	Crimes dealt with universal jurisdiction	74
6.3	The controversy of universal Jurisdiction	77
6.3.1	Immunity of head of states	77
6.3.2	Interference into a state's sovereignty	78
6.3.3	Interference into a state's self-determination	78
6.4	Conclusion	78
7	The case of Hissène Habré	80
7.1	The background of the Habré case	80
7.2	The case	80
7.2.1	Obstacles from then onwards	81
7.3	States and others involvement in the case	82
7.3.1	Belgium and the Habré case	82
7.3.2	African Union and the Habré case	83
7.3.3	Senegal and other stakeholders in the Habré case	84
7.4	The case today	85
7.4.1	Challenges in the Habré case	86
7.5	Conclusion	87
8	The case of Faryadi Sarwar Zardad	88
8.1	Background of the case	88
8.1.1	The conflict of Afghanistan between 1978 and 2001	88
8.1.2	Zardad's role in the Afghanistan conflict	89
8.2	The case	89
8.3	Challenges of the case	91
8.3.1	Juries knowledge of universal jurisdiction	91
8.3.2	Was Zardad a "public official"?	91
8.3.3	Admissibility of video identification	92
8.4	Conclusion	92
9	Discussion	94
9.1	What are the main advantages and disadvantages of the International Criminal Court?	94
9.1.1	Advantages of the ICC	94

9.1.2	Disadvantages of the ICC	95
9.2	What are the main advantages and disadvantages of universal jurisdiction?.....	95
9.2.1	Advantage of universal jurisdiction	95
9.2.2	Disadvantage of universal jurisdiction	96
9.3	How can both systems serve international justice?.....	96
9.4	What is the future of each system?	97
9.4.1	Challenges of universal jurisdictions in the domestic legal systems	97
9.4.2	Further ratifications of the Rome Statute to promote the ICC's work.....	98
10	Conclusion	99
11	Bibliography	101
12	Appendix	111

List of Abbreviations

Art.	Article
ATPDH	Association for the Promotion and Defense of Human Rights
AU	African Union
AVPRC	The Chadian Association of Victims of Political Repression and Crime
CAR	Central African Republic
CAT	Committee Against Torture
CEAJ	Committee of Eminent African Jurists
DDS	Direction de la Documentation et de la Sécurité
DRC	Democratic Republic of Congo
ECOWAS	Court of Justice of the Economic Community of West African States
EU	European Union
EUROPOL	European Police Office
FIDH	International Federation of Human Rights
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICID	International Commission of Inquiry on Darfur
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
Janjaweed	Armed chevalier troops attacking civilians in Darfur
LRA	Lord Resistant Army
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OIC	Organization of the Islamic Conference
PICT	Project on International Courts and Tribunals
SC	Security Council
SLA	The Sudan Liberation Army

SLM	The Sudan Liberation Movement
UNCOI	UN Commission of Inquiry on Darfur
UK	United Kingdom
UN	United Nations
UNAMIS	United Nations Advance Mission in Sudan
UNHCR	United High Commissioner for Refugees
UNIMIS	United Nations Mission in Sudan
9/11	The attacks on New York and Washington D.C. in 2011

List of international documents

I. International Treaties

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945

Charter of the United Nations, 24 October 1945

Statute of the International Court of Justice, 18 April 1946

Convention on the Prevention and punishment of the crime of genocide, 9 December 1948,

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1948

Universal Declaration of Human Rights, 10 December 1948

International Covenant on Civil and Political Rights, 16 December 1966

Vienna Convention on the Law of Treaties, 23 May 1969

American Convention on Human Rights, *"Pact of San Jose"*, Costa Rica, 22 November 1969,

Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 24 October 1970

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

Statute of the International Criminal Tribunal for Rwanda, 8 November 1994

Rome Statute of the International Criminal Court (*last amended January 2002*), 17 July 1998

Statute of the Special Court for Sierra Leone, 16 January 2002

II. Resolutions (General Assembly, Security Council)

GA Res. 41/133 (1986)

SC Res. 181 (1963)

SC Res. 955 (1994)

SC Res. 1547 (2004)

SC Res. 1556 (2004)

SC Res. 1564 (2004)

SC Res. 1593 (2005)

SC Res. 1672 (2006)

SC Res. 1970 (2011)

III. Cases

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), International Court of Justice, 14 February 2002, ICJ Reports (2002) 3.

Attorney Gen. of Israel v Eichmann (Isr. Sup. Ct. 1962), 36 I.L.R. 277, 29899

R v Bow Street Magistrate, ex parte Pinochet Ugarte [No. 3] [1999] 2 All ER 97 (UK)

R v Faryadi Sarwar Zardad, 18 July 2005, Central Criminal Court

The Prosecutor versus Jean Kambanda, Case no. ICTR 97-23-S

The Prosecutor versus Jean-Paul Akayesu, Case no. ICTR-96-4-T

The Prosecutor versus Omar Hassan Ahmad Al Bashir, Case no. ICC-02/05-01/09

The Prosecutor v. Thomas Lubanga Dyilo, Case no. ICC-01/04-01/06

Annexes

Annex 1: International Criminal Court Participation	17
Annex 2: Structure of the International Criminal Court	18
Annex 3: ICC contributions 2008 in Pounds Sterling/million	32
Annex 4: ICC Investigations 2011	33
Annex 6: Summary of ICC activities in Africa	38
Annex 7 Chronic of the Sudan Conflict.....	45

1 Introduction

My interest in this topic, the International Criminal Court and universal jurisdiction as two approaches to hold jurisdiction over human rights abusers, results from an internship at the Ludwig Boltzmann Institute of Human Rights in Vienna from October 2010 until March 2011. I drafted a study on universal jurisdiction in Austria within the framework of an Amnesty International project. This allowed me to deepen my knowledge of international criminal law.

Throughout my studies I always questioned the different concerns of universal jurisdiction approaches. I asked myself whether the principle of universal jurisdiction would help the international community to hold jurisdiction over human right abusers and how this principle correlates with the International Criminal Court.

1.1 Relevance to international development

This topic is relevant to my studies in International Development for many reasons. First, the enhancements of human rights and international law make up a vital aspect of international development. The international and nongovernmental organizations mentioned in this thesis are vital players in this process. Furthermore the selected cases have an impact on the development of peace and justice, as will be discussed. Since this thesis is not addressed to a judicial department I shall briefly explain some legal terms and concepts of international law.

1.2 Scope of the study

I decided to analyze several cases to emphasize the two international criminal law approaches to hold jurisdiction over human rights abusers:

- The international court systems with a focus on the International Criminal Court
- The principle of universal jurisdiction.

The international court systems will be discussed by means of the cases of Omar Al-Bashir from the International Criminal Court and two cases from the International Tribunal for Rwanda, the Jean Paul Akayesu and the Jean Kambanda case, as a precedent to the International Criminal Court.

I will examine the principle of universal jurisdiction by detailing first the Hissène Habré case, which depicts the difficulties and challenges of the application of universal jurisdiction. Also I will describe the Faryadi Zardad case as a best practice example of the application of universal jurisdiction.

All affairs exhibit specific differences and similarities, which makes comparing the two systems so interesting.

Throughout the course of this thesis I shall first provide the reader with an insight into the topic and then outline the different approaches to international criminal law regarding certain political problems and concepts of realization.

1.3 Research questions

I based my thesis on the following four research questions:

- a. What are the main advantages and disadvantages of the International Criminal Court?
- b. What are the main advantages and disadvantages of universal jurisdiction?
- c. How can both systems serve international justice?
- d. What is the future of both systems?

1.4 Methodology

The methodological basis of this thesis is analytical and qualitative research.

1.4.1 Analytical

I carried out a content analysis of the chosen literature. The literature was chosen from various sources, which I had researched in between October 2010 until March 2012.

Important sources were scientific books and specific literature papers, which I found at the LSE library in London and in various libraries in Vienna. Additional material was provided by the official homepage of the International Criminal Court, which allowed me to watch live streams of ongoing court hearings to better understand the system. Up to date information was taken from recent published academic articles and online published newspaper articles.

Other essential sources include the international documents of various states and international institutions, such as the Rome Statute, UN Security Council Resolutions or the Charter of the United Nations. Also, reports from Non-Governmental Organizations (NGOs) as Human Rights Watch (HRW) or Amnesty International (AI) were taken into account.

1.4.2 Qualitative

The basis for the qualitative analysis is empirical evidence in the context of the international criminal law system. Therefore I chose several cases, which will be described in detail regarding their progresses and the applied laws and provisions.

A case study collects empirical data to verify an abstract theory. This requires the detailed and extensive study of a case related to a person, community, organization, or event.¹The aim of a case study is to concentrate an otherwise overwhelmingly abstract account. It is therefore a commonly used method in the social sciences. Furthermore case studies must make clear how its actions are linked to the theory one wants to describe.²

On basis of the chosen cases I have defined criteria, which state how far the investigations are advanced, which problems occur and whether the prosecution of human rights abusers is possible.

1.5 Chapter outline

Following this introductory chapter, I will provide an insight into international criminal law (chapter 2). Chapter 3 presents the International Criminal Court, followed by the case study of Omar Al-Bashir (chapter 4). Chapter 5 outlines the International Criminal Court for Rwanda and two case studies, the ones of Jean Paul Akayesu and Jean Kambanda. Chapter 6 explains the principle of universal jurisdiction. The following two chapters discuss the cases of Hissène Habré (chapter 7) and the case of Faryadi Sarwar Zardad (chapter 8) as examples for the use of universal jurisdiction. In Chapter 9 I discuss and answer my research questions. Finally, the conclusion will be presented in chapter 10.

¹ Bryman, 2004: 48f

² Mitchell, 1984: 240f

2 Introduction to international criminal law

In this chapter I will first describe international law before focusing on the explanation of international criminal law and its scope and differences to national criminal law. In the second part I will focus on major legal terms and customary international law, in order to make this thesis and the described cases more comprehensible. At last I will present the existing international cooperation- and judicial assistance tools in international law, which aim to secure that an accused stands a trial.

2.1 International law

Robert Beckman, professor of the law department of the National University of Singapore defines International Law in a way that its complexity is made very clear:

*„International law consists of the rules and principles of general application dealing with the conduct of states and of international organizations in their international relations with one another and with private individuals, minority groups and transnational companies.“*³

2.1.1 Sources of international law

One of the main characteristics of international law is the fact that international lawyers use mostly treaties and customary international law as a source of material.⁴

The sources of international law are reflected in Article 38 of the Statute of the International Court of Justice (ICJ). Those are considered as primary sources of international law.

International law can therefore derive from:

- a.) International conventions: where rules are established and explicitly recognized by the contesting states;
- b.) International customs and
- c.) The general principles of law recognized by civilized nations.⁵

International conventions are commonly known as treaties. A treaty is an agreement between states, underlying the “*pacta sunt servanda*” principle - the binding force to a

³ Beckman & Butte, 2011: 1

⁴ Lowe, 2007: 5f

⁵ Lowe, 2007: 35

party of a treaty - and the performance in *good faith*. Treaties are only binding on states parties and not on third parties without their consent. They can be adopted at international conferences and become open for signature to every country. Signing of a treaty does not impose legal obligations on a signatory state. Therefore states demonstrate, by signing a treaty, their intention to be bound by this treaty at some indefinite future date. In the period between signing and ratification of a treaty a state has, as its only obligation as a signatory state, to refrain from acts that would defeat the object or purpose of the treaty, as Article 18 of the Vienna Convention of the Law of Treaties states:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty (if)

*(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;*⁶

Only if a state ratifies the treaty it becomes binding. The state is then referred to as a party of the treaty. General principles of law, such as the right for compensation or reparation, find application in all legal systems. This occurs when a person harms another person intentionally, for instance⁷

Article 38 of the Statute of the International Court of Justice lists as well subsidiary means to prove the existence of a rule of custom or a general principle of law. Those are subject to the provision of Article 59 of the Statute of the International Court of Justice, the teachings of highly qualified publicists and judicial decisions. They are referred to as secondary sources of international law.

UN General Assembly resolutions are only seen as recommendations and are therefore not legally binding. In certain circumstances, however, they can act as a subsidiary mean and strong evidence of rules of customary international law. Also, they can act as a subsequent agreement on the interpretation of the provisions of the UN Charter. Examples are the UN General Assembly resolutions on the Universal Decla-

⁶ Article 18 Vienna Convention on the Law of Treaties, 1969

⁷ Beckman & Butte, 2011: 4

ration of Human Rights (1948), the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Sovereignty (1965) [Declaration on Non- Intervention], the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (1970) [Declaration on Friendly Relations] or the Resolution on the Definition of Aggression.⁸

Only with the establishment of the ad hoc tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in the 1990s an international criminal law regime has developed.⁹

2.2 International criminal law

Throughout history, a crime that was committed within the border of a state was seen as a national problem. Crimes happening in other states were not in the interest of governments unless the crime was committed abroad by a citizen of this state. Then those criminals could, in theory, be forced to return to their home country by force of international cooperation and extradition agreements.

Today this system has changed completely. Globalization has challenged the criminal justice system of all states. Organized crime, terrorism, drug trafficking or money laundering is not restricted by any state boundaries. International cooperation has therefore gained more importance to combat crime in recent times. The gathering of evidence was facilitated through the organizations Interpol and Europol. The protection of human rights and the fight against the above-mentioned crimes, made these designated as international crimes.¹⁰

The establishment of the ad hoc tribunals, introduced to bring perpetrators of atrocities in former Yugoslavia and Rwanda to justice, pointed out the need of an international criminal law system. International criminal is a branch of public international law. It is now widely accepted and its sources are found in treaties, national legislation, judicial decisions and the state practice.¹¹

⁸ Beckman & Butte, 2011: 5

⁹ Cryer, Friman, Robinson, & Walmshurt, 2007: 1f

¹⁰ Dugard & Wyngaert van den, 1996: xi

¹¹ Dugard & Wyngaert van den, 1996: xi f

John Dugard, director of the research centre for international law at the University of Cambridge, classified in 1996 international criminal law in between:

“Criminal law, which is predicated on vertical authoritative decision making institutions which rely on coercive means to enforce their rules; and international law, which is a horizontal system premised on the consent of states and which knows no superior law-making or law-enforcing authority.”¹²

Consequently both disciplines have different approaches on how to handle international criminal law. Nevertheless, discussions help in the advancement of the development of international criminal law. The biggest jurisdictional problem is the interference into a states sovereignty, which will be explained in various sections of this thesis.¹³

There are two distinct forms in which way the implementation of international criminal jurisdiction and the prosecution of human rights abusers are handled, if domestic courts take no action,

- On the one side by international courts or tribunals (e.g. ICC, ICTR, ICTY)
- On the other side through the domestic application of the principle of universal jurisdiction.¹⁴

2.3 Explanation of legal terms

2.3.1 Principles of international criminal law

2.3.1.1 Sovereignty

Sovereignty is one of the legal principles of a state and a fundamental rule of international law. It is the absolute right of a supreme political authority over a certain territory and the people within it. No other state can interfere in this political independence.

Core elements of the principle of sovereignty are for example: the right to exclude aliens or the entry into another territory by armed forces as a *prima facie* breach of

¹² Dugard & Wyngaert van den, 1996: xiii

¹³ Dugard & Wyngaert van den, 1996: xxi

¹⁴ Macedo, 2001: 15f

international law. This regulation guarantees that official representatives of states or diplomats are not subject to jurisdiction of a state other than their own.¹⁵

2.3.1.2 Nullum crimen sine lege

This fundamental principle of criminal law states that someone can only be held responsible for a crime if the act was criminalized by law before committing the act and if it was understood to imply criminal consequences. Thus it follows the two guidelines: the non-retroactivity and the clarity of the law.

In Article 15 of the International Covenant on Civil and Political Rights (ICCPR) it is stated that:

“No one shall be held guilty on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed....Nothing in this article shall prejudice the trial of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations.”¹⁶

2.3.1.3 Nulla poena sine lege

The principle of *nulla poena sine lege* (Latin: no penalty without law) states that someone can only be punished if law prohibits it and has defined a penalty for this criminal behavior. It is therefore essential that every criminal prohibition has defined penalties.

2.3.1.4 Ius cogens

Some rules or principles are necessary in order for international law to work as a legal system. For example the fundamental principle of international law, that states are bound to their treaty obligations (*pacta sunt servanda*). This has always been implicit in the legal system and is thus not an exception to the requirement of consent. The *ius cogens* principle is based on the fact that some moral principles are so

¹⁵ Beckman & Butte, 2011: 3f

¹⁶ Cryer, Friman, Robinson, & Walmshurt, 200: 13

important (e.g. the prohibition of genocide) and commonly recognized that exceptions to them cannot be tolerated in any legal system.¹⁷

Also, there is a category of rules and principles of customary international law that are non-derivable as peremptory rules of international law. For example, the prohibition of the crimes of slavery, piracy, torture or genocide count as *ius cogens* crimes. Article 53 of the Vienna Convention on the Law of Treaties states the following definition of *ius cogens*:

*‘A norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.*¹⁸

2.1.2.5 Ne bis in idem

The principle of *ne bis in idem* states that no one can be tried twice for the same crime. It is a fundamental principle of law recognized in international human rights treaties and other instruments.

This principle is listed in Article 14 of the International Covenant on Civil and Political Rights (ICCPR), in Article 8 (4) of the American Convention on Human Rights, in Article 75 (4) (h) of the Addition Protocol I to the Geneva Convention, in Article 10 (1) of the International Criminal Tribunal for the former Yugoslavia, in Article 9 of the Statute of the Special Court for Sierra Leone and in Article 20 of the Rome Statute.

However, retrials after an acquittal by the same jurisdiction are prohibited. Other states thus have the permission to step in when the territorial state or the suspect's state conducts a sham or unfair trial.¹⁹

2.4 International crimes

The statute of the International Criminal Court defines in Article 1 and Article 5 that international crimes are “the most serious crimes of concern to the international

¹⁷ Lowe, 2007: 58f

¹⁸ Lowe, 2007: 59f

¹⁹ Conway, 2003: 217f

community as a whole, which threaten the peace, security and well-being of the world".²⁰

M. Cherif Bassiouni, a leading international criminal law expert, points out five criteria that are applicable for international crimes in his book "*Introduction to international criminal law*":

- (1) the prohibited behavior is affecting a substantial international interest with a threat to international peace and security,
- (2) the behavior is an outrageous offence to the commonly shared values of the world's community;
- (3) the behavior has trans-national character and effects more than one state in its planning, preparation or commission;
- (4) the behavior harms an internationally protected person or interest;
- (5) the behavior violates an internationally protected interest but doesn't have the level of criteria (1) and (2), nevertheless it can be prevented by international criminalization.²¹

One ought to mention at this point that most of international crimes are *ius cogens* crimes, thus a peremptory norm. Some of these crimes are:

- Aggression
- Genocide
- Crimes against humanity
- War crimes
- Unlawful possession or use of emplacement of weapons
- Theft of nuclear materials
- The concept of mercenaries
- Apartheid
- Slavery or slave-related practices

²⁰ Cryer, Friman, Robinson, & Walmshurt, 2007: 4

²¹ Bassiouni, 2003: 114f

- Torture and other forms of cruel, inhuman or degrading treatment or punishment
- Unlawful human experimentation.²²

2.5 Customary international law

Customary international law has two essential components.

Firstly the general practice, also referred to as the “material element”, the evidence of an international custom accepted by law;

And secondly the opinio juris, also referred to as the “psychological element”, the acceptance of a practice as law.

The principle of immunity of head of states, the criminal immunity of foreign diplomats, the inviolable treatment of foreign diplomatic premises or the protection of non-combatants during an international armed conflict is a result of customary international law, for example. An additional component is the time element. Rules that apply to customary international law generally imply that they are long-established practices.²³

Customary international law binds all states. The proof of *opinio iuris* is an obligation of the state asserting the existence of a rule of customary law rule. It therefore claims a persistent and permanent usage among states over a period of time.²⁴

2.6 Principles of jurisdiction

The territorial principle stipulates that a state has the power to determine and enforce laws within its territory. In certain cases- if the matter affects the states territory- it may go outside its boundaries.

The nationality principle, also called active nationality principle, claims jurisdiction over nationals of a state. The passive nationality principle claims jurisdiction over aliens for crimes affecting one of their nationals.²⁵

²² Bassiouni, 2003: 121f

²³ Lowe, 2007: 36f

²⁴ Beckman & Butte, 2011: 4f

²⁵ Malanczuk, 1997: 111

The universality principle declares that states may hold jurisdiction over certain crimes such as piracy, slavery, torture, war crimes, crimes against humanity and genocide even if the offence was not committed by their citizens or in their territory. It is based on the nature of a crime.²⁶

The principle of good faith is set out in the 1970 Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States. It declares that its parties ought to fulfill their obligations in good faith in accordance with the Charter of the United Nations. This includes treaties and customary international law. This declaration has two aspects: the first is the accurate interpretation of rules and the second is the affirmation that states are bound by the law and obligations they assumed.²⁷

The “aut dedere aut judicare” principle is incorporated in many multilateral treaties. It refers to the alternative obligation to either extradite or prosecute. It aims to fight impunity of certain atrocious crimes of international concern. The “aut dedere aut judicare” principle demands the state in which the perpetrator resides to either extradite him to another state, which is willing to try the offender or to prosecute him before its national courts.²⁸

The principle of complementarity is a relatively new concept in international law. It has raised discussions on different levels, especially regarding state sovereignty. The International Law Commission first introduced this principle in 1994 in order to organize the jurisdictional relations between the International Criminal Court and national courts. It states that the International Criminal Court only has jurisdiction if national courts are unable or not willing to prosecute the underlying international crimes.²⁹

2.7 International cooperation and judicial assistance

2.7.1 Interpol

Interpol (The International Criminal Police Cooperation) was set up in 1923 in Vienna and is today the largest international police organization worldwide. It consists of 187

²⁶ Beckman & Butte, 2011: 4f

²⁷ Lowe, 2007: 117f

²⁸ Wise & M.Bassiouni, 1995: 3

²⁹ Jurdi 2011: 9f

member countries and has the purpose to facilitate cross-border criminal police co-operation. Its core functions are:³⁰

- a secure global communications system,
- operational databases- to identify and arrest criminals and terrorists-,
- twenty four hour operational support as well as
- training and development.

Interpol works in six priority areas. These are public safety and terrorism, criminal organizations, drug-related crimes, financial and high tech crime, trafficking in human beings, anti-corruption and fugitive investigation support.

Searching for fugitives is a vital function for an effective criminal justice system. Interpol acts in the spirit of the Universal Declaration of Human Rights, as stated in Article 2 of its Constitution. Interpol also provides international coordination and support for the investigation and prosecution of genocide, war crimes and crimes against humanity, especially for the ad hoc tribunals, ICTY, ICTR and the ICC. It publishes so called “Red Notices”, a warrant for international wanted criminals, investigates their location, arrests them and brings the perpetrators of those crimes to justice.³¹

2.7.2 Europol

Europol is the European law enforcement agency, with approximately 700 people working at the headquarters in The Hague. It aims to support member states of the European Union in their fight against serious international crimes and terrorists. Almost 12 000 cross- border investigations are carried out each year by Europol. One of its functions is to facilitate the cooperation of the various intelligence agencies of the member states. Interpol has the same task on an international level. However, unlike Interpol, Europol is neither authorized to arrest accused persons and nor entitled to conduct investigations.³²

³⁰ Carvelli 2008: 2f

³¹ Carvelli 2008: 2f

³² Europol, 2012

3 The International Criminal Court

In this chapter I will focus on the work, the development and the history of the International Criminal Court (ICC) with its seat at The Hague, in the Netherlands. In order to understand the system it is important to provide an insight into the structure, scope and limitations of the ICC, which I will discuss in the second part of this chapter. Furthermore the problems the International Criminal Court is facing today will be mentioned, in particular the accusation of being a neo-colonialist institution.

3.1 History of the International Criminal Court

Although there have been talks about a war crime court dating back to the early nineteenth century, the concept of the International Criminal Court derives from the Nuremberg and Tokyo Tribunals after the Second World War.³³ The time span to establish a global criminal court, which lasted over a century, is sometimes referred to as “the road to Rome”.³⁴

Gustav Moynier, one of the founders of the International Committee of the Red Cross (ICRC), was the first known person who was eager to establish a permanent court in 1872 to prosecute the crimes of the Franco-Prussian War (1870 -1871). But Moyniers draft statute with the content to prosecute breaches of the Geneva Convention of 1864 and other humanitarian norms was too radical at this point of time.³⁵

The next attempt for an internationalized system of justice was introduced in 1919 with the Treaty of Versailles. It was a response to the war crimes of the First World War to try German war criminals as well as Kaiser Wilhelm II.³⁶ However, the United States opposed the idea of an ad hoc international court, as it would be *ex post facto justice*. They also argued that the crimes against the *law of humanity* were a question of morality and not law. As a result the drafters of the Treaty of Versailles agreed that firstly the law of humanity was not taken into account and secondly to establish an ad hoc tribunal to prosecute Kaiser Wilhelm II. However, he fled to the Netherlands, which never extradited him. He died there in 1941.³⁷

³³ Chandra & Suren, 2010: 318f

³⁴ ICCNOW, 2012

³⁵ Schabas, 2007: 2

³⁶ ICCNOW, 2012

³⁷ Schabas, 2007: 3

Another attempt to establish an international criminal court failed in 1937. Many legal experts, as the International Law Association and the International Association of Penal Law, tried to promote the ratification of a treaty by the League of Nations, which provided the creation of an international criminal court. However, this treaty never came into force as not a sufficient number of states ratified it.³⁸

The major step in the Road to Rome was the establishment of the ad hoc tribunals after World War II. In 1946 the Allies signed the London Agreement, which provided for the creation of an international military tribunal. The Nuremberg Charter established the Nuremberg Tribunal to prosecute war criminals for crimes against peace, war crimes and crimes against humanity. It convicted 22 Nazi leaders between 1945 and 1948. The Tokyo Charter, which was proclaimed by the Supreme Commander of the Allied Powers General Douglas MacArthur, established the International Military Tribunal for the Far East (Tokyo Tribunal) as a similar tribunal to the one in Germany. It acted for two years from 1946 to 1949. 25 defendants were found guilty on various counts.³⁹

Only after the judgments of the Nuremberg and Tokyo tribunals the international community resumed to work again on this “forgotten project” to establish an international criminal court. The United Nations General Assembly adopted in 1948 the Convention on the Prevention and Punishment of the Crime of Genocide. Article VI of this Convention mentioned an international penal tribunal:

*Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.*⁴⁰

Consequently, in the 1950's the International Law Commission, an experts group selected by the United Nations General Assembly, was mandated to draft for a statute

³⁸ Schabas, 2007: 5

³⁹ Schabas, 2007: 7

⁴⁰ Article VI UN Convention of the Prevention and Punishment of the Crime of Genocide, 1948

of an international criminal court. It submitted a proposal in 1954. Due to the Cold War this draft did not find international agreement.⁴¹

In 1989 Trinidad and Tobago, which were plagued by narcotic problems and related transnational crime issues, initiated a resolution in the General Assembly to establish an international criminal court. Therefore the United Nations General Assembly urged the International Law Commission to revive its work on this matter to create a statute for the International Criminal Court.

In the meantime two ad hoc tribunals were established to prosecute the war crimes of the former Yugoslavia in 1993 and the genocide in Rwanda in 1994. Having received a draft statute from the International Law Commission two years before, the United Nations General Assembly established a preparatory committee in 1996.⁴²

In 1998 the United Nations Conference of Plenipotentiaries on the establishment of an International Criminal Court held a meeting in Rome. The result was the completion of the Rome Statute. On 17 July 1998 this statute created the permanent International Criminal Court with its seat in The Hague. Since this date the ICC is mandated to prosecute perpetrators of the worst crimes.

120 states voted in favor of the draft, 21 states abstained from their votes, and seven states voted against it. The ICC treaty (also referred to as the Rome Statute) came into force on 1 July 2002 with its required 60th ratification.

Eight months later the first 18 judges commenced their work. Shortly afterwards Luis Moreno-Ocampo was elected as the first prosecutor by the states parties to the ICC treaty. Finally, as the chief administrator Bruno Cathala, took office, the International Criminal Court was able to start its work.⁴³

3.2 Member states of the International Criminal Court

A majority of states are a member of the International Criminal Court. With the ratification of Guatemala of the Rome Statute on 2 April 2012, 121 states are currently

⁴¹ Schabas, 2007: 8

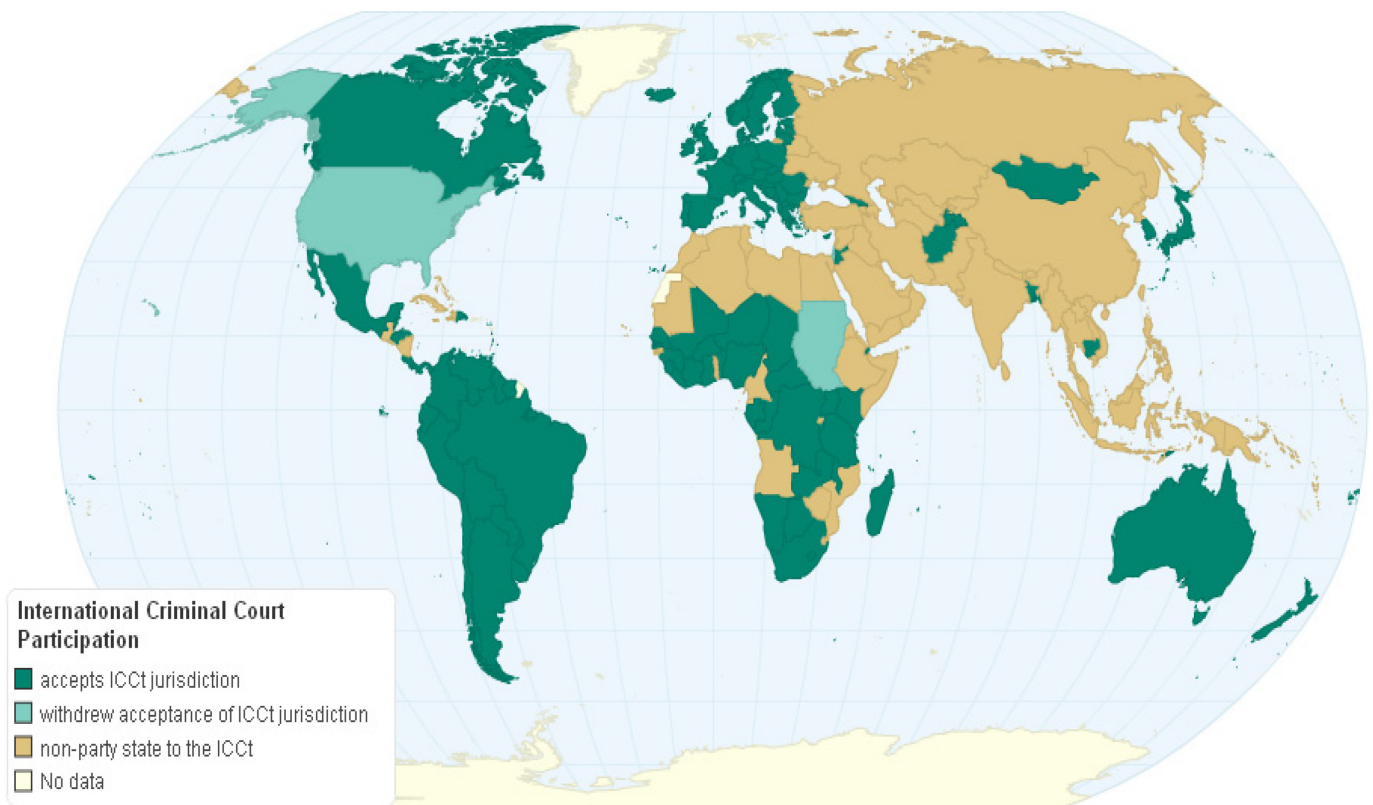
⁴² Chandra & Suren, 2010: 318f

⁴³ Human Rights Watch, 2008: 4

part of the Rome Statute system. 19 states have signed the Rome Statute but have not yet ratified it.⁴⁴

The states that ratified the treaty can be segmented into

- 33 African States,
- 18 Asia- Pacific States,
- 18 Eastern European States,
- 27 Latin American and Caribbean States and
- 25 Western European and other States.⁴⁵



Annex 1: International Criminal Court Participation⁴⁶

⁴⁴ Nuremberg Human Rights Center, 2011: 22

⁴⁵ ICC-CPI, 2012

⁴⁶ International Criminal Court Participation, 2011

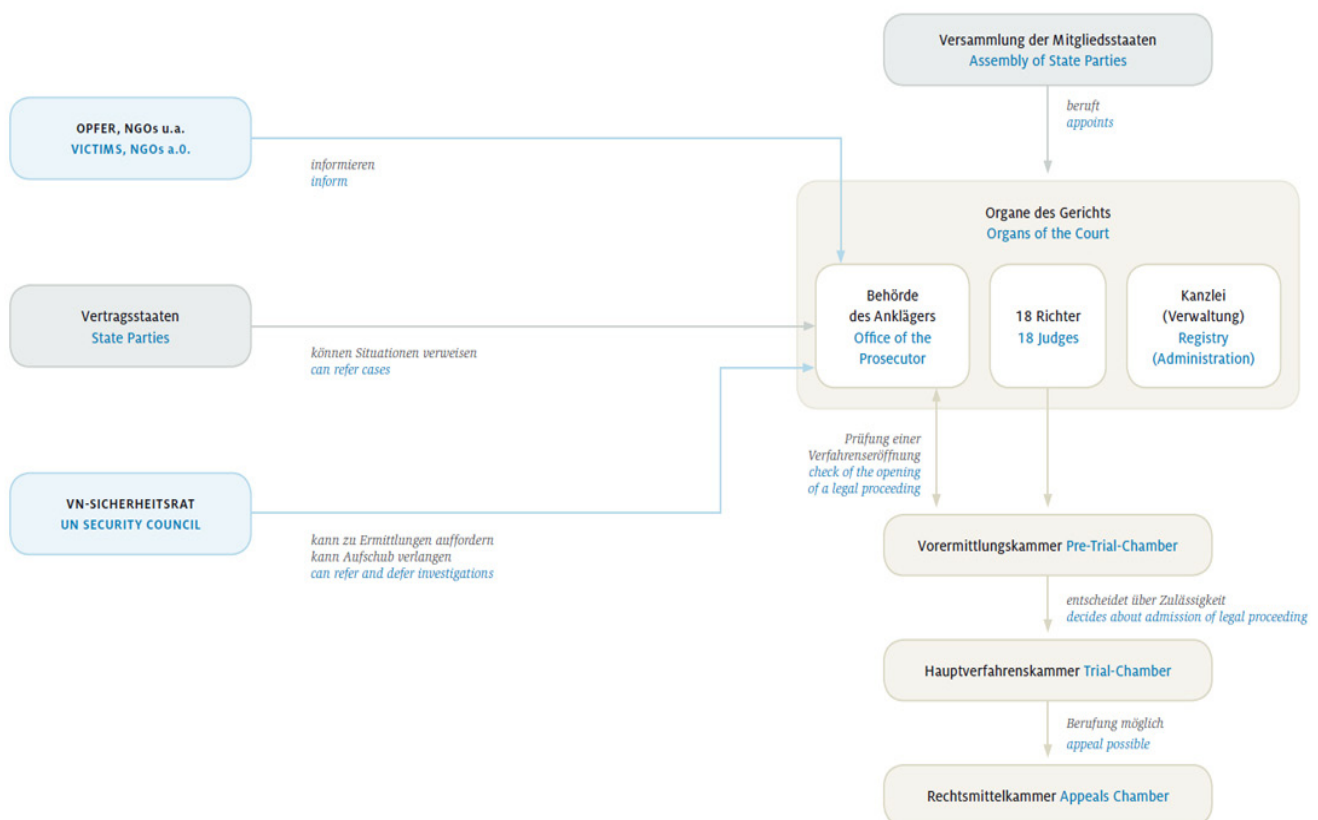
3.3 The organization and the work of the International Criminal Court

The International Criminal Court has approximately 700 members of staff from various states. Its working languages are English and French, but its six official languages are: English, French, Arabic, Chinese, Russian and Spanish. The program budget for 2011 was 103.6 million Euros.⁴⁷

3.3.1 Structure and organs of the International Criminal Court

The Court is a strictly independent institution and not a direct part of the United Nations system. It is structured into four organs: the Presidency, the Judicial Divisions, the Office of the Prosecutor, the Registry; and some other offices.⁴⁸ They are described in the following sub-chapters. Annex 2 highlights the structure of the court:

DIE STRUKTUR DES GERICHTS - THE STRUCTURE OF THE COURT



Annex 2: Structure of the International Criminal Court⁴⁹

⁴⁷ ICC-CPI, 2012

⁴⁸ ICC-CPI, 2012

⁴⁹ Nuremberg Human Rights Center, 2011: 62

3.3.1.1 The presidency

The presidency consists of the president and two vice-presidents. They are elected for a three-year term, which can be renewed, by an absolute majority (meaning more than 50 per cent of the votes) from the judges of the Court.

One of the functions of the president is judicial, such as assigning cases to chambers, reviewing legal decisions of the registrar and arranging cooperation agreements with various states.

Another main responsibility is the administration of the Court, the supervision of the registrar's work and the coordination of the prosecutor.

Finally, the president also has the responsibility to maintain relations with states and other entities and to represent and promote the International Criminal Court in his duty of external relations.⁵⁰

3.3.1.2 Judicial divisions

The judiciary of the International Criminal Court is divided into

- the appeals division,
- the trial division and
- the pre-trial division.

Their functions are carried out by the chambers.

The appeals chamber consists of the court's president and four other judges. For each appeal it chooses a presiding judge.

The other chambers are composed of three judges each, who are assigned to the division for a period of three years. When this time has passed they stay in office until they complete the case, if the hearing has already started. According to Article 39 (1) of the Rome Statute those judges should have a combination of different qualifications, experiences and expertise in criminal and international law.⁵¹

⁵⁰ ICC-CPI, 2012

⁵¹ ICC-CPI, 2012

3.3.1.3 Office of the prosecutor

Since 16 June 2003 the Argentine lawyer Luis Moreno-Ocampo has held the office of the prosecutor. Fatou Bom Bensouda, a legal expert from Gambia, will be the new chief prosecutor from 16 June 2012 onwards.

This organ of the court is divided into three divisions:

- the prosecutions division,
- the investigation division,
- the complementarity and cooperation division.

Under Article 42 of the Rome Statute the office of the prosecutor acts independently as a separate central organ of the International Criminal Court. The prosecutor chooses whether a situation should be investigated and whether or not perpetrators of crimes underlying the Rome Statute should be prosecuted.⁵²

As stated in Article 53 (1) of the Rome Statute:

„The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute.“⁵³

Furthermore he has to act if the Security Council or a state refers a situation to him. This will be detailed in chapter 3.3.4.

However, the Pre-Trial Chamber may review a decision of the prosecutor as stated in Article 53 (3) (a):

“At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.“⁵⁴

Under Article 68 of the Rome Statute the prosecutor is to some extent responsible for protecting witnesses. The International Criminal Court has to conduct its investiga-

⁵² ICC-CPI, 2012

⁵³ Article 53 Rome Statute, 2002

⁵⁴ Article 53 Rome Statute, 2002

tions in a way to ensure that no one who provides evidence is lacking of safety. Investigators rely on states cooperation and international organizations to arrest suspects.⁵⁵

3.3.1.4 The registry

As a neutral organ, the registry's duty is the non-judicial administration and support to all the organs of the International Criminal Court in guidance by the ICC Strategic Plan. Its head is the registrar as the principal administrative officer of the International Criminal Court. The registry is responsible for the quality, efficiency, transparency and timeliness of the court. The 'Rules of Procedure and Evidence' state the registry's obligations. This includes organizing the staff to promote the rights of the defense in consistency with the principles of a fair trial. This implies the right for indigent persons to have a legal assistance paid by the International Criminal Court.⁵⁶

3.3.1.5 Other offices

Established in 2005, the Office of the Public Counsel for Victims is one of the semi-autonomous offices. It is fully independent except it falls under the registry for administrative purposes. The Office of the Public Counsel for Victims ensures an effective participation of victims in the proceedings before the International Criminal Court by providing legal support and assistance.⁵⁷

Another one of these semi-autonomous offices is the Office of the Public Counsel for Defense, which represents and protects the rights of the defense pursuant to Regulation 77 of the regulations of the International Criminal Court.⁵⁸

The Trust Fund is a completely independent institute of the International Criminal Court, but cooperates with the court nevertheless. It was established by the Assembly of States Parties of the Rome Statute to benefit victims and their families of crimes within the jurisdiction of the court.⁵⁹

3.4 Jurisdiction and admissibility

The International Criminal Court jurisdiction is limited to the following crimes.

⁵⁵ ICC-CPI, 2012

⁵⁶ ICC-CPI, 2012

⁵⁷ ICC-CPI, 2012

⁵⁸ ICC-CPI, 2012

⁵⁹ ICC-CPI, 2012

Thus to:

- genocide,
- crimes against humanity,
- war crimes and
- the crime of aggression.

All these crimes are defined in the Rome Statute and will be discussed later in this chapter.

Individuals are subject to the court's jurisdiction. This includes those directly responsible for committing the crimes as well as others who may be liable for the crimes, e.g. military commanders or other superiors.

The jurisdiction is not universal and has certain limits. For example, it is limited to the extent that the accused

- must to be a national of a state party,
- that the crime took place on the territory of a state party or
- a referral of the United Nations Security Council or a state to the prosecutor.⁶⁰

The International Criminal Court acts under the strict principle of complementarity as it is regulated in paragraph 10 of the preamble of the Rome Statute and as Article 1 of the Rome Statute affirms:

*"An International Criminal Court ("the Court") is hereby established It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions."*⁶¹

The admissibility provisions in Article 17 to 20 of the Rome Statute regulate the complementarity system. Articles 18 and 19 of the Rome Statute handle the procedure of

⁶⁰ ICC-CPI, 2012

⁶¹ Article 1 Rome Statute, 2002

the International Criminal Court. Articles 17 and 20 of the Rome Statute point out substantive criteria.⁶²

For example Article 17 (1) of the Rome Statute states four scenarios in which the International Criminal Court cannot admit a case:

1. *The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;*
2. *The case has been investigated by a state which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute;*
3. *The person concerned has already been tried for conduct which is the subject of the complaint,*
4. *The case is not of sufficient gravity to justify further action by the International Criminal Court.*⁶³

Taking this into consideration, the International Criminal Court can only investigate a case or precede a prosecution if a state is unwilling or unable to do so. Article 17 (3) states that the Court shall in order to determine the inability in a particular case

*consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.*⁶⁴

At last, the crimes must be as stated in Article 17 (1) (d) of the Rome Statute of certain gravity as a main criteria in the decision making process of intervening. The gravity of a case is the scale of the crimes, their nature, the way they were committed and their impact.⁶⁵

⁶² Broomhal, 2004: 87

⁶³ Article 17 (1) Rome Statute, 2002

⁶⁴ Article 17 (3) Rome Statute, 2002

⁶⁵ Jurdi, 2011: 9f

Summoning up, the International Criminal Court only has jurisdiction of the crimes mentioned above in acting under the principle of complementarity and if it fulfills the following detailed requirements.

3.4.1 Jurisdiction *ratione temporis*

Jurisdiction *ratione temporis* determines at what point in time the crimes have been committed so that a court has jurisdiction. The Rome Statute limits the International Criminal Courts jurisdiction to crimes committed after the Rome Statute entered into force. Therefore the International Criminal Court can never have jurisdiction over crimes committed before July 2002. Thus the principle of non- retroactivity, as stated in Article 23 of the Rome Statute, applies to those crimes.⁶⁶

3.4.2 Jurisdiction *ratione personae*

The following lines answer the question of who can be judged by the International Criminal Court.

- only people over the age of eighteen
- and no states or abstract entities can be prosecuted by the International Criminal Court.

Exclusions for criminal responsibility are:

- mental disability,
- drunkenness,
- acting in defense of oneself or
- acting because of the threat of death or bodily harm.

Perpetrators must have intended the crime and must be able to recall the event. For example a high commander is liable if he knew that his forces committed crimes under the jurisdiction of the International Criminal Court.⁶⁷

As stated in Article 27 of the Rome Statute it is irrelevant if the perpetrator is a head of state or government, a member of parliament or any other representative or government official.

⁶⁶ Boot, 2002: 41

⁶⁷ Calvo-Goller, 2006: 182f

“This Statute shall apply equally to all persons without any distinction based on official capacity”⁶⁸

The Rome Statute does not grant immunity for commanders or other superiors, if he or she knew or should have known of the crimes committed under his or her commandment or did not prevent the crime in good faith. This applies to everyone who has the ability to order and control subordinates, as for example political leaders or senior civil servants. Of course there exists a different standard of knowledge necessary to be liable for a crime committed by others.⁶⁹

3.4.2.1 Difference between the International Criminal Court and the International Court of Justice

In contrast to the International Court of Justice, which decides legal disputes between states, the International Criminal Court tries individuals. Another main difference between those two courts is the fact that the International Court of Justice is one of the principal organs of the United Nations, whereas the International Criminal Court acts on behalf of the Assembly of States Parties to the Rome Statute.⁷⁰

3.4.3 Jurisdiction *ratione materiae*

In the following section I will focus on the four crimes that can be brought before the International Criminal Court. The preamble of the Rome Statute states that the jurisdiction of the court is limited to

*“the most serious crimes of concern to the international community as a whole”.*⁷¹

Those crimes listed in Articles 6 to Article 8 of the Rome Statute are genocide, crimes against humanity, war crimes and the crime of aggression.⁷²

3.4.3.1 Genocide

The word genocide was introduced in 1943 by Raphael Lemkin in his book about Nazi imperialism. Mr. Lemkin, a Polish lawyer, wrote this book in response to the Second World War atrocities. Therefore genocide implies the meaning of race, nation or

⁶⁸ Article 27 Rome Statute, 2002

⁶⁹ Calvo-Goller, 2006: 195f

⁷⁰ Boot, 2002: 62

⁷¹ Article 5 (1) Rome Statute, 2002

⁷² Boot, 2002: 5

tribe-from the Greek word '*genos*'- and killing- from the Latin suffix '*cide*'. Mr. Lemkin was a Jewish descendent and already fought against genocide in the Holocaust.⁷³ Genocide and crimes against humanity have since then been called the 'crime of crime' and the 'gravest violation of human rights possible to commit.'⁷⁴

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides only jurisdiction by the state in which the crime was committed or by states which have accepted an international tribunal's jurisdiction. Since the permanent introduction of the International Criminal Court the crime of genocide has become enforceable as an *ius cogens* crime.⁷⁵

The definition in Article 6 of the Rome Statute matches the 1948 Genocide Conventions definition and the statutes of the ICTY and the ICTR.⁷⁶

Thus genocide means any of the following acts committed with the intent to destroy a national, ethnical, racial or religious group, in party or as a whole:

- a.) Killing members of the group;
- b.) causing serious bodily- or mental harm to members of the group;
- c.) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d.) imposing measures intended to prevent births within the group;
- e.) forcibly transferring children of the group to another group.⁷⁷

3.4.3.2 Crimes against humanity

This crime is codified in Article 7 of the Rome Statute. The concept of crimes against humanity was first mentioned in the Statute of the International Military Tribunal in Nuremberg. The Rome Statute has now combined the latest of the five previous definitions of crimes against humanity.⁷⁸

According to this definition it means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with

⁷³ Cooper, 2008: 22

⁷⁴ McGoldrick, Rowe, & Donnelly, 2004: 143f

⁷⁵ McGoldrick, Rowe, & Donnelly, 2004: 143f

⁷⁶ Boot, 2002: 26f

⁷⁷ Article 6 (1) Rome Statute, 2002

⁷⁸ Boot, 2002: 26f

knowledge of the attack:

- a.) Murder;
- b.) Extermination;
- c.) Enslavement;
- d.) Deportation or forcible transfer of populations;
- e.) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f.) Torture;
- g.) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h.) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- i.) Enforced disappearance of persons;
- j.) The crime of apartheid;
- k.) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁷⁹

3.4.3.3 War crimes

Article 8 of the Rome Statute states that the International Criminal Court shall have jurisdiction over war crimes especially when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

War crimes are - just mentioned consolidated and not exclusive - as stated in Article 8 of the Rome Statute:

- a.) Grave breaches of the Geneva Convention of 1949
- b.) Other serious violations of the laws and customs applicable in international armed conflict
- c.) Serious violations of article 3 common to the four Geneva Conventions in a non-international armed conflict.

⁷⁹ Article 7 (1) Rome Statute, 2002

Thus there is a distinction of war crimes committed in international armed conflicts and in internal armed conflicts.⁸⁰

3.4.3.4 Crime of aggression

The discussion of prosecuting aggression became an issue already at the Nuremberg trial. The planning and waging of aggressive war was described as a crime of the utmost gravity at this point. An obstacle to a prosecution on these legal terms was the principle of legality, thus the judges of the Nuremberg trial answered⁸¹:

*"To assert that it is unjust to punish those in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished"*⁸²

Article 5 of the Rome Statute lists this crime of aggression as one of the core crimes under the jurisdiction of the Court. However, in 1998, the Rome Statute did not define the crime or set out the jurisdictional conditions. Therefore the International Criminal Court remained unable to exercise jurisdiction over the crime of aggression at this point of time. On 11 June 2011, after long-lasting discussions, a definition of the crime of aggression was finally realized at the Review Conference of the Rome Statute in Kampala (Uganda). However, the ICC's jurisdiction regarding this crime will only come in effect after 1 January 2017.⁸³

Article 8 bis (1), which defines the crime of aggression, was therefore adopted in Kampala. It was finally defined as:

„the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression (note: act of aggression

⁸⁰ Article 8 (1) Rome Statute, 2002

⁸¹ McGoldrick, Rowe, & Donnelly, 2004: 123.f

⁸² United States of America et al v Goering et al, 1946

⁸³ ICCNOW, 2012

*defined in Article 8 bis (2)) which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.*⁸⁴

In Articles 15 bis and 15 ter special regulations for the exercise of jurisdiction regarding the crime of aggression are regulated. Contrary to a Security Council referral, as later described, the prosecutor may only exercise a 'proprio motu' or a 'state referral of a situation' to the crime of aggression investigation if the following three conditions apply.

1. after ascertaining whether the Security Council has determined the existence of an act of aggression,
2. having waited for six months since the act of aggression was committed between states parties and,
3. after the authorization of the commencement of the investigation of the Pre-Trial Division of the ICC.⁸⁵

3.4.4 Initiation of investigations and prosecutions

Article 13 of the Rome Statute states three possibilities to initiate a proceeding before the International Criminal Court, which I will detail below. The self referral of a situation by a state-party to the prosecutor, a UN Security Council referral of a situation to the prosecutor and the initiation of an investigation of the prosecutor on his own authority (*proprio motu*).⁸⁶

Article 13 states the exercise of jurisdiction as follows:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) *A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;*
- (b) *A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the*

⁸⁴ Article 8 bis (1) Rome Statute, 2002

⁸⁵ ICCNOW, 2012

⁸⁶ Sewall & Kaysen, 2000: 73f

Security Council acting under Chapter VII of the Charter of the United Nations; or

- (c) *The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.*⁸⁷

3.4.4.1 Self-referral of a situation by a state party to the prosecutor

Article 13 (a) of the Rome Statute grants any state party of the Rome Statute the right to point out a situation to the prosecutor in which they believe crimes within the International Criminal Courts jurisdiction happened. With this referral they can trigger an investigation, which can lead to a prosecution of potential perpetrators of the crimes of genocide, crimes against humanity, war crimes or the crime of aggression.⁸⁸

3.4.4.2 UN Security Council referral of a situation to the prosecutor

Within Article 13 (b) of the Rome Statute the United Nations Security Council can refer a situation in which crimes within the International Criminal Court's jurisdiction appear to have been committed to the prosecutor.

The prosecutor can then choose whether or not to initiate investigations. The prosecutor is therefore not obliged to act after the UN Security Council referred a situation but has the competence to do so.⁸⁹

3.4.4.3 Initiation of an investigation of the prosecutor "proprio motu"

Article 13 (c) constitutes that the prosecutor of the International Criminal Court can initiate an investigation on his own authority. He must be able to rely on information from a trustworthy source about crimes happening within the Court's jurisdiction. The prosecutor therefore regularly interacts with non-governmental organizations (NGOs), other international organizations and states to obtain this information. The International Criminal Court thus fully participates with private sector stakeholders. Nevertheless, the pre-trial chamber has to review the investigations initiated "proprio motu" by the prosecutor and authorize it.⁹⁰

⁸⁷ Article 13 Rome Statute, 2002

⁸⁸ Sewall & Kaysen, 2000: 73f

⁸⁹ Sewall & Kaysen, 2000: 73f

⁹⁰ Sewall & Kaysen, 2000: 73f

3.5 Financing of the International Criminal Court

Article 113 of the Rome Statute assures that:

“Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties”.⁹¹

The basic elements of the financial framework of the International Criminal Court are regulated in Article 112 of the ICC treaty. The funding is made by contributions of states parties to the Rome Statute, the United Nations, approved by the General Assembly, and by voluntary contributions. Those voluntary contributions must be in accordance with criteria adopted by the Assembly of States Parties of the Rome Statute. They must fulfill the International Criminal Court’s independence- and impartiality principle. Article 112 (2) (d) states that the Assembly of States Parties considers and decides the budget of the court. Article 118 ensures an independent auditor.⁹²

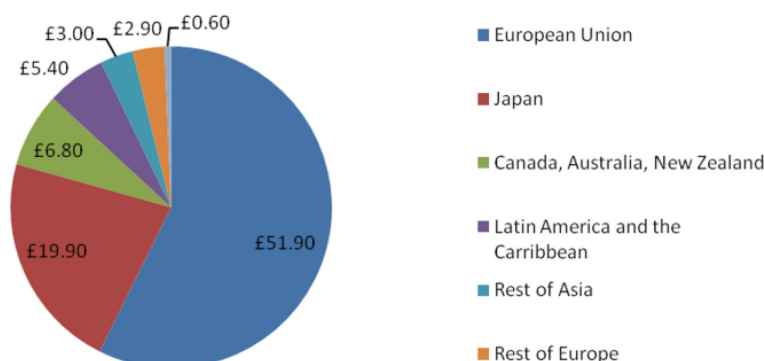
As mentioned before, the states parties to the Rome Statute finance the ICC. The following illustration shows the International Criminal Courts contributions from 2008. The amount is determined by the various countries capacity to pay. The factors to be taken into consideration are the national income and numbers of population - the same method as the United Nations contribution system. Japan, for instance, paid 22 per cent of the courts budget in 2008, as illustrated below. This is the maximum amount a single country can pay in a year.⁹³

⁹¹ Article 112 Rome Statute, 2002

⁹² Romano & Ingadottir, 2000: 5

⁹³ ICC-CPI, 2012

International Criminal Court contributions, 2008



Annex 3: ICC contributions 2008 in Pounds Sterling/ million⁹⁴

3.6 Investigations and cases

Since June 2003, the month the office of the prosecutor got inaugurated, subsequently some investigations got initiated.

At this point in time there are seven investigations ongoing, namely the situations in Uganda, the Democratic Republic of Congo, the Central African Republic, Sudan (Darfur), Kenya, Libya and Cote d'Ivoire.

The office of the prosecutor is conducting seven preliminary examinations by monitoring the situations in Afghanistan, Colombia, Georgia, Honduras, Nigeria, the Republic of Korea and Guinea.

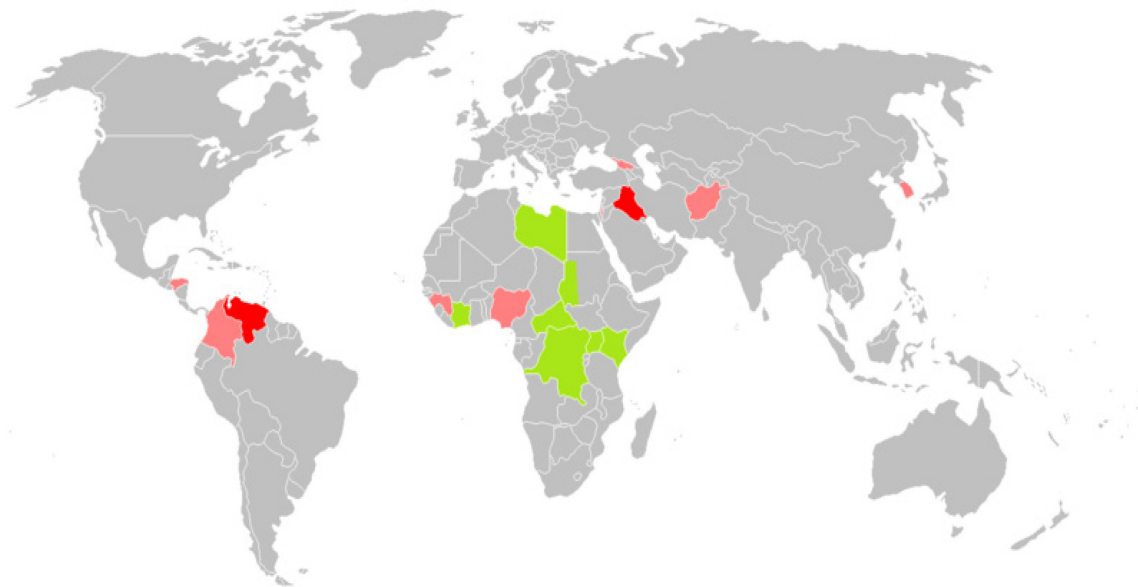
20 arrests warrants have been issued, of which six arrests have been made. Nine summonses to appear before the court have been issued. All suspects voluntarily appeared before the International Criminal Court and are all not in custody.

The greatest success of the ICC was made on 14 March 2012. At this date Thomas Lubanga Dyilo was found guilty of the war crimes of enlisting and conscripting children under the age of 15 into military forces, and using them to participate actively in hostilities.⁹⁵

⁹⁴ ICC-CPI, 2012

⁹⁵ ICC-CPI, 2012

The following illustration graphically highlights the ongoing and closed official investigations, as well as the preliminary examinations from September 2011.



Annex 4: ICC Investigations 2011⁹⁶

■ Official investigations (Uganda, Congo, Central African Republic, Darfur (Sudan), Kenya, Libya, and Côte d'Ivoire)

■ Preliminary examinations (Afghanistan, Colombia, Guinea, Georgia, Honduras, Nigeria, Palestine and Korea)

■ Closed preliminary investigations (Iraq and Venezuela)

3.7 The ICC and Africa – the allegation of being a neo colonialist institution

Some critics call the International Criminal Court “the International Criminal Court for Africa” as most of the investigations concerned Africa. The ICC is therefore often criticized of being a neo-colonialist institution. I want to discuss this criticism, focusing on the background and reasons of this allegation. Until now just two investigations were initiated by the prosecutor on his own authority, otherwise the Security Council referred a situation to the prosecutor or states parties to the Rome Statute referred their situation to the International Criminal Court.

⁹⁶ ICC Investigations World Map, 2011

3.7.1 Investigations and prosecutions by the ICC in Africa

3.7.1.1 Libya

The situation in Libya is the International Criminal Courts sixth investigation and was initiated by a UN Security Council referral (Res. 1970) to the ICC prosecutor on 26 February 2011. This was the second time of a UN Security Council referral on the grounds of Chapter VII of the United Nations Charter. The prosecutor announced to open an investigation in the situation on 3 March 2011 and three warrant of arrest, respectively for Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, for crimes against humanity were issued. The case against Muammar Gaddafi was dropped due to his death on 22 November 2011.

3.7.1.2 Kenya

On 31 March 2010 the prosecutor opened the investigation in the situation in Kenya *proprio motu* in relation to crimes against humanity allegedly committed during the 2007/2008 post-election violence. In this fifth investigation of the ICC, the prosecutor used his powers to initiate an investigation on his own initiative for he first time. Kenya is a state party to the Rome Statute since 2005. Various summonses to appear were issued on 8 March 2011 and the suspects made their appearance before the International Criminal Court on 7 and 8 April 2011.⁹⁷

3.7.1.3 Darfur

The Situation of Darfur, as presented in depth in the next chapter with the Bashir case, got referred to the prosecutor by the UN Security Council Resolution 1593 in March 2005. Currently there are four ongoing cases in the situation in Darfur; five warrants of arrest have been issued against Ahmad Harun, Ali Kushayb, Sudanese Defense Minister Abdel Raheem, Muhammad Hussein and Sudanese President Omar Hassan Ahmad Al-Bashir. Furthermore three summonses to appear were issued, who all appeared voluntarily before the Pre Trial Chamber I. of the ICC.⁹⁸

3.7.1.4 Northern Uganda

In December 2003 the government of Uganda referred the conflict of Northern Uganda to the International Criminal Court. In July 2004 the prosecutor decided that he

⁹⁷ ICC-CPI, 2012

⁹⁸ Sriram & Suren, 2010: 220

would commence an investigation, having analyzed the available information on the conflict. In October 2005 arrest warrants were issued for crimes against humanity and war crimes for the senior leaders of the Lord's Resistance Army (LRA), Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya. A field office was established in Kampala to aid with the ongoing operation.⁹⁹

3.7.1.5 Democratic Republic of Congo

In April 2004 the government of the Democratic Republic of the Congo (DRC) referred its situation to the International Criminal Court. It urged the prosecutor to initiate an investigation of crimes happened in the DRC since the Rome Statute entered into force on 1 July 2002. In June 2004 the prosecutor opened with the situation of the DRC the first investigation of the International Criminal Court. Five warrants of arrest have been issued. The trial against Congolese warlords Germain Katanga and Matthieu Ngudjolo Chui is currently at second trial. One suspect, Mr. Bosco Ntaganda, remains at large. On 16 December 2011, Pre Trial Chamber I. declined to confirm the charges of alleged crimes against humanity and war crimes against Callixte Mbarushimana. He was released on 23 December 2011.

Thomas Lubanga Dyilo, the leader of the Union of the Congolese Patriots, a political and military movement, was the first accused person in a trial of the International Criminal Court in 2009.¹⁰⁰ Lubanga was found guilty on 14 March 2012 of the war crimes of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities. He is the first verdict of the International Criminal Court. The Trial Chamber I. of the International Criminal Court set out 13 June 2012 as a date to hear oral submissions for sentencing Thomas Lubanga Dyilo.¹⁰¹

3.7.1.6 Central African Republic

On 22 December 2004 the Central African Republic (CAR) self referred its case to the court about crimes happening within the jurisdiction of the ICC on their territory. This was the third self-referral by a state party to the Rome Statute. The CAR investigated internally on the principle of complementarity but came to the conclusion in

⁹⁹ Coalition for the International Criminal Court (a), 2011

¹⁰⁰ Coalition for the International Criminal Court (c), 2011

¹⁰¹ ICC-CPI, 2012

2006 that its judicial system was not able to administrate the prosecutions. It was not until 22 May 2007 the prosecutor of the International Criminal Court formally initiated an investigation against former DRC vice-president, Jean-Pierre Bemba Gombo, for alleged crimes committed in the Central African Republic. The trial, which opened on 22 November 2010, is currently ongoing.¹⁰²

3.7.1.7 Côte d'Ivoire

Côte d'Ivoire is not a state party to the Rome Statute. However, it has accepted the International Criminal Courts jurisdiction on 18 April 2003. The prosecutor started its seventh investigation into war crimes and crimes against humanity allegedly committed in Côte d'Ivoire. It was the second *proprio motu* investigation of the prosecutor. A warrant of arrest against former president Laurent Koudou Gbagbo was issued on 23 November 2011. It was unsealed as the Ivorian authorities transferred him to The Hague. An initial appearance hearing was held on 5 December 2011. The hearing for the confirmation of charges is scheduled for 18 June 2012.¹⁰³

3.7.1.8 List of all ICC activities in Africa until today

Summoning up, the list below shows the activities of the International Criminal Court in Africa until today. Among other things, the ICC issued arrest warrants, opened investigations, scheduled trials, dismissed cases, confirmed charges, unsealed arrest warrants and initiated trials.

¹⁰² Coalition for the International Criminal Court (b), 2011

¹⁰³ ICC-CPI, 2012

Situation	Case	Status
Libya <u>UN Security Council referral (Res 1970)</u>	Muammar al Gaddafi, his son Saif Al-Islam and intelligence chief Abdullah al Senussi for crimes against humanity (murder and persecution) committed across Libya from 15 to at least 28 February 2011.	<u>Pre-trial stage</u> : UN Security Council referral on 26 February 2011. Investigations opened on March 3. Arrest warrants issued on 27 June 2011. Case against Muammar al Gaddafi terminated due to his death. Other suspects not yet in custody.
Kenya <u>Investigation proprio motu</u>	Politician William Ruto, Minister of Industrialization Henry Kosgey and journalist Joshua Arab Sang.	<u>Trial stage</u> : Suspects appeared voluntarily before the Court in April 2011 in responses to summonses.
	Deputy Prime Minister Uhuru Kenyatta, Caninet Secretary Francis Muthaura and Maj. Gen. Hussein Ali.	Pre-trial Chamber confirmed some charges and committed Mr. Ruto, Mr. Sang, Mr. Muthaura and Mr. Kenyatta to trial before an ICC Trial Chamber.
Darfur, Sudan <u>UN Security Council referral (Res. 1593)</u>	Former Interior Minister Ahmad Muhammad Harun and alleged former militia leader Ali Kushayb	<u>Pre-trial stage</u> : Arrest warrants issued in May 2007. Suspects at large. Harun is governor of Sudan's Southern Kordofan state.
	Darfur rebel leader Bahar Idriss Abu Garda	<u>Charges declined</u> : Prosecutor's case dismissed by ICC judges in February 2010
	Darfur rebel leaders Abdallah Banda Abakaer Nourain, and Saleh Mohammed Jerbo Jamus	<u>Trial stage</u> : charges confirmed in March 2011. Banda and Jerbo appeared voluntarily before the Court in response to summonses in June 2010.
	Sudanese President Omar Hassan al Bashir	<u>Pre-trial stage</u> : Arrest warrant issued in March 2009 for war crimes and crimes against humanity. Additional arrest warrant issued for genocide in July 2010. Bashir re-elected president in April 2010.
Uganda <u>Referral by the government of Uganda</u>	LRA commanders Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya	<u>Pre-trial stage</u> : Arrest warrants unsealed in October 2005. Otti and Lukwiya reportedly dead. Remaining suspects at large.
Democratic Republic of Congo <u>Referral by the government of the DRC</u>	Alleged militia leader Thomas Lubanga Dyilo	<u>Trial-stage</u> : Trial initiated in January 2009. Convicted on 14 March 2012.
	Alleged militia leaders Germain Katanga and Mathieu Ngudjolo Chui	<u>Trial stage</u> : Joint trial initiated in November 2009. Suspects transferred to ICC custody. Public hearing will start on 15 May 2012.

	Former militia and rebel leader turned DRC army officer Bosco Ntaganda	<u>Pre-trial stage</u> : Arrest warrant issued in August 2006, unsealed in April 2008. Suspect remains at large.
	Alleged militia political leader Calixte Mbarushimana	<u>Charges declined</u> : Arrested in France in October 2010, transferred to ICC custody on January 25, 2011. Released on 23 December 2011. Prosecutor appealed the decision on 12 March 2012.
Central African Republic <u>Referral by the government of the CAR</u>	Former Congolese rebel leader turned Congolese transitional vice president and Senator Jean-Pierre Bembe Gombo	<u>Trial stage</u> : Trial initiated in November 2010. Suspect arrested in Belgium and transferred to ICC custody in July 2008.
Côte d'Ivoire <u>Investigation proprio motu</u>	Former president Laurent Koudou Gbagbo	<u>Pre-trial stage</u> : Prosecutor requested authorization to open a full investigation on June 23, 2011.
Guinea	-	<u>Preliminary examination.</u>
Nigeria	-	<u>Preliminary examination.</u>

Annex 5: Summary of ICC activities in Africa¹⁰⁴

3.7.2 Reasons of the disproportional focus of investigation in Africa

The allegation of being a neo-colonialist institution derives from the fact that most cases have been in African States. Thus the focus has been disproportional to African States.

To explain this misbalance one ought to mention that there are many African States, which ratified the Rome Statute. Many of those are currently, or have been in a state of conflict. Since those conflicts happened after the crucial date of 2002, many African countries are subject to the ICC's jurisdiction.

Another important point is the fact that many African States handed in their cases themselves. It would therefore be wrong to consider these actions as an intervention to their sovereignty. Even in the case of the United Nations Security Council Resolution 1593 two out of three African States voted in favor for it.¹⁰⁵

¹⁰⁴ Arieff, Margesson, Browne, & Weed, 2011: 8

¹⁰⁵ Sriram & Suren, 2010: 321

Chandra Lekha Sriram, a professor of law at the London School of Economics, even raised the question whether governments are manipulating the International Criminal Court and not vice-versa. She explains this argument with the following case.

The government of Uganda tried to draw off prosecutor's attention from the crimes they committed themselves across the country by pointing out the atrocities of the Lord Resistance Army (LRA) in the north. Even the mentioned situation in the Central African Republic originated from an internal political struggle and might have been led by the government wishing to stay in power. Chandra Lekha Sriram believes that these cases were brought before the ICC because the countries in question were unable to handle the cases themselves. This was due to their weak state capacity and dysfunctional judiciaries. It was therefore up to the International Criminal Court to handle those more difficult cases.¹⁰⁶

3.7.3 Failure of investigations in other countries

3.7.3.1 Venezuela

The prosecutor of the ICC also investigated Venezuela. However, nearly all the alleged incidents were dropped due to the International Criminal Court's temporal jurisdiction. This means the crimes were committed before July 2002. The crimes, which happened after this date, were investigated but did not meet the definition of crimes against humanity. It could not be proven that those crimes occurred as a systematic attack on the civilian population.¹⁰⁷

3.7.3.2 Iraq

The case of Iraq firstly lacked the International Criminal Court's territorial and personal jurisdiction, as Iraq is not a state party to the Rome Statute. When claims arose that the war in Iraq was illegal, it was discussed if it is a crime of aggression. The problem of the crime of aggression was discussed in chapter 3.3.3.4. Since this crime had not been defined at this stage, it could not get investigated. The office of the prosecutor did not find crimes meeting the definitions of genocide or crimes against humanity. The evidence of the alleged war crimes was not sufficient. There was evidence of allegations of the crimes of willful killing and mistreatment of civilians. In the

¹⁰⁶ Sriram & Suren, 2010: 322

¹⁰⁷ Sriram & Suren, 2010: 323f

end the investigation failed as they did not meet the standards of the gravity threshold of Article 8 (1) of the Rome Statute.¹⁰⁸

3.7.3.3 The United States

President Bill Clinton authorized the United States of America on 31 December 2000 to sign the treaty creating the International Criminal Court. As said before the ICC treaty, which created the International Criminal Court, was adopted in Rome in 1998. In that year 120 states voted in favor of the court and seven countries against it. The United States was one of the countries, which voted strictly against it, although it was involved in negotiating the ICC treaty. Towards the end of President Clinton's government the treaty was finally signed. However, under the Bush administration the treaty was ultimately "unsigned". The United States' rejection of the International Criminal Court has negative effects on it. To mention is the undermining of the Court's operation and the possibility of a delay of a referral, which can have immense adverse outcomes.¹⁰⁹

3.8 The correlations between the United Nations Security Council and the International Criminal Court

Chapter V of the United Nations charter explains the composition, functions, powers, voting and procedure of the Security Council. Article 24 of the United Nations Charter determines that

*"its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."*¹¹⁰

Therefore the Security Council is a supreme executive organ of the United Nations acting in securing world peace, without having legislative or judicial powers in the Charter of the United Nations. Nevertheless the UN Security Council is only allowed to act under article 27 of the UN Charter if the five permanent member states (China, France, Russian Federation, United Kingdom of Great Britain and Northern Ireland and United States of America) do not use their veto. Thus an act of aggression by a

¹⁰⁸ Chandra & Suren, 2010: 324f

¹⁰⁹ Chandra & Suren, 2010: 318f

¹¹⁰ Article 24 (1), Charter of the United Nations, 1945

permanent member state will never be dealt with. This is the discriminative position of the United Nations Security Council.¹¹¹

Under Article 13 (b) of the Rome Statute the UN Security Council has an influence on the International Criminal Court. If a situation in the enforcement of international peace and security maintenance occurs, the International Criminal Court can exercise jurisdiction over international crimes on the Security Council's referral. Therefore Article 13 (b) of the Rome Statute creates the possibility to jurisdiction of states that are not party to the Rome Statute.¹¹²

3.9 The International Criminal Court's contribution to peace and security

In this sub chapter I want to highlight how the International Criminal Court contributes to the establishment of peace and security.

Former United Nations Secretary General Kofi Annan stated in a speech

*“For nearly half a century- almost as long as the United National has being in existence—the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought...that the horrors of the Second World War the camps the cruelty, the exterminations, the Holocaust could never happen again. And yet they have, in Cambodia, in Bosnia and Herzegovina, in Rwanda. Out time—this decade even has shown us that man's capacity for evil knows no limits. Genocide...is now a word of our time, too, a heinous reality that calls for a historic response.”*¹¹³

One ought to ask the question how the methods to bring grave crimes to justice influence the prospects of peace and security in conflict regions.

Some diplomats who are negotiating peace fear that the International Criminal Court's prosecutions can restrain fragile peace talks. As Human Rights Watch Re-

¹¹¹ Köchler, 2011: 9f

¹¹² Köchler, 2011: 49

¹¹³ United Nations, 1999

ports on peace and justice show, the impact of justice is sometimes undervalued in resolving a conflict.

The arrest warrant against Omar Al Bashir has triggered a backlash in peace talks for instance. The African Union and the Organization of the Islamic Conference (OIC) asked the UN Security Council to postpone the work of the International Criminal Court in Sudan for twelve months. Critics said that the arrest warrant affected negatively the work of humanitarian agencies in Sudan.¹¹⁴

Contrarily, the end of the Bosnian war following the Dayton negotiations can be seen as a result of the arrest warrant against Radovan Karadzic. He consequently couldn't attend the peace talks, which led to them being successful. Thus the effect of marginalization of leaders with an arrest warrant may benefit peace processes.¹¹⁵

*"There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance."*¹¹⁶

as the former Nuremberg Prosecutor, Benjamin B. Ferencz stated.

Therefore the prosecution of some war criminals will deter others and might thus help to bring a conflict to an end.

3.9.1 Conclusion

The International Criminal Court celebrates its 10th anniversary and its first verdict this year. It was finally introduced in 2002 as a novel 21st century institution to protect each citizen in the world. As explained, the ICC is a well-established permanent court and is a useful instrument to prosecute perpetrators of grave crimes of international law. However, the jurisdiction is limited, as explained, in various ways.¹¹⁷

With the amendment of the review conference in Kampala the crime of aggression was finally defined. Years to come will show how those cases of aggression will be treated.

¹¹⁴ Dareshshori & Evenson, 2010: 35f

¹¹⁵ Dareshshori & Evenson, 2010: 35f

¹¹⁶ United Nations, 1999

¹¹⁷ Moreno-Ocampo, 2008

One backlash of the ICC is the fact that the United States, China, Russia and other powerful nations remain outside the jurisdiction of the International Criminal Court. The scope of the court is therefore limited to weaker states. Those strong states can thus shield themselves and their allies from jurisdiction. It would be a great success if many more states ratify the ICC treaty in the future. It is crucial that as many states as possible acknowledge the International Criminal Court and their obligation to protect human rights.¹¹⁸

Summoning up, the International Criminal Court bears hope for universal justice, although some countries obstruct its work and there are still some difficulties, such as better cooperation between the member state parties or the lack of effective enforcement mechanisms, to overcome. Humanity still has a long way to go before impunity of grave violations of human rights law and international law will be eradicated. However, the creation of the ICC was a major step in that direction.

Furthermore it is important that the United Nations Security Council and the ICC continue their close relations. Their cooperation is important in order to fight impunity of the perpetrators of the worst crimes.

¹¹⁸ Chandra & Suren, 2010: 319

4 The case of Omar Al-Bashir before the ICC

In the fourth chapter of this thesis the case of the current Sudanese President Omar Hassan Ahmad Al-Bashir will be analyzed and its current status of investigation described. In order to make the case more comprehensible, the conflict in Sudan and the international involvements in it will be explained first. Furthermore, the antecedent provisions of the United Nations to the Resolution 955, which initiated the investigations on the case, are detailed. Also, the human rights violations, which occurred in Darfur and are still ongoing, are shortly explained in this chapter.

4.1 The conflict in Sudan (Darfur)

Sudan has been independent since the year 1956. Sadly, the country has been in conflicts constantly ever since that date. In 2003, with different tribes fighting against one another, the violence reached a level of intensity that forced the international community to intervene.

With the UN Security Council's Resolution 1564 from 18 September 2004 the investigation of violations of human rights in Darfur started. This was made under the UN Secretary General Kofi Annan, who established an international commission (The International Commission of Inquiry on Darfur) to investigate the acts of genocide in Darfur and to hold those committed the crimes responsible.¹¹⁹

Today an estimated 2.4 Million inhabitants have been displaced internally in Sudan, the biggest country in Africa. In neighboring Chad there are approximately 300.000 refugees due to this conflict. Sources differ regarding the numbers of death tolls they declare. It is therefore difficult to define the accurate number of the people that have been killed in the conflict. However, the numbers suggest that approximately some 100.000 deaths were counted. The region of the conflict is situated in the Sudanese states North-, West- and South- Darfur, which are situated in the Northwest of the Country, bordering Libya, Chad and the Central African Republic. This region, inhabited by approximately six million people, is fragmented by many different ethnicities. The biggest ethnicity, the Fur, gave its name to this Region. "Dar" means "country" or

¹¹⁹ Chandra & Suren, 2010: 333f

“region” in Arab. The dominating religion is the Islam and the Arab language is widely spoken.¹²⁰

To describe the conflict in detail would exceed my thesis but I will mention the most important issues chronologically and highlight different dimensions, which led to it:

1956	Sudan becomes independent from the British- Egyptian rule
1958	Military coup by General Abbud against the elected civilian government
1962	Civil war starts through the Anya Nya movement in the South
1972	Addis Ababa peace agreement. The south becomes a self-governing region
1983	Civil War in the South between government forces and the Sudan Peoples Liberation Movement (SPLM)
1983	Islamic Law imposed by the introduction of the Sharia
1989	Bashir came to power in an Islamist-backed coup
1993	Omar Al Bashir appointed himself President of the country
1999	Sudan begins to exports oil
2004	National army quells the uprising rebels in western Darfur, leading to thousands of refugees. United Nations stated that the Pro Government Arab Janjaweed Militias (armed cavalier troop) are carrying out systematic killings. The killings are described as genocide by the US Secretary of State
2005	Peace Agreement between government and southern rebels (CPA)
2006	Rebel Groups reject a peace deal with the government → fighting continues in Darfur. UN Resolution for a peacekeeping force gets rejected
2007	UN Peacekeepers are accepted to assist the African Union Peacekeeping Mission in Darfur
2007	ICC issues the first arrest warrant against Omar Al-Bashir
2008	Tensions between Sudan and Chad. Fights in the town of Abyei. ICC issues a second arrest warrant for President Al Bashir for genocide, crimes against humanity and war crimes in Darfur.

Annex 6 Chronic of the Sudan Conflict¹²¹

¹²⁰ Hassan & Ray, 2009: 370f

¹²¹ Hassan & Ray, 2009: Annex 1

4.2 Reasons leading to the escalation of the conflict

Robert Frau adduces the following dimensions leading to the escalation of the conflict:

The first dimension is the religious aspect: In the Darfur conflict, in contrast to the South Sudan, this is not a major problem as the Islam has been the dominant religion since the 17th in the north. However, since the events of 9/11, Frau argues, the Sudanese government was able to attacks the Darfur inhabitants as western states would not care about an inter-state Muslim conflict at this point.¹²²

The second is the local dimension: as natural resources (water, plantations, and forest) got limited through the constant and enduring fights and destruction of land, local bloody conflicts between farmers and nomads followed.¹²³

The third is the national dimension: In the beginning of the 1980ies a civil war broke out between the Christian Africans in South Sudan and the Central Government in Khartoum. The Government armed Arab tribes in Darfur and ordered them to fight against the Rebels in South Darfur. Only in 2004 the conflict ended as the Sudan People's Liberation Army/Movement (SPLA/M) and the Central Government signed the Naivasha agreement on power and land distribution. This agreement led to the independence Referendum beginning of 2011 declaring South Sudan's Independence on 9 July 2011.¹²⁴

In 2002 and 2004 two Rebel groups were formed: The Darfur Liberation Front (later named the Sudan Liberation Movement/Army (SLM/A)) and the Justice and Equality Movement.¹²⁵

The Arab Militia became famous under the name "Janjaweed" – the so-called armed cavaliers. They have been and still are one of the most brutal and ruthless people on earth, attacking villages, killing and raping civilians. The procedures usually follow a certain pattern: The government sends planes to bomb villages, whereupon the Janjaweed ride in on horses or camels to attack those villages in the Darfur region. They pillage homes, rape and murder civilians and burn the villages down to the

¹²² Frau, 2010: 505

¹²³ Frau, 2010: 306

¹²⁴ Encyclopaedia Britannica Editorial, 2010

¹²⁵ Frau, 2010: 307f

ground. The Janjaweed claim to be independent to the national army but are nevertheless controlled by the central government in a way.¹²⁶

The fourth dimension is the international dimension. It explains the international actors and the reasons for intervention legitimated by Chapter VII of the United Nations Charter securing international security and peace. The neighboring country Chad, for instance, was involved in the conflict in numerous ways. It signed agreements to help solving the conflict. In eastern Chad one of the biggest refugee camps in the world is situated. But the Janjaweed even made their way to Chad in order to attack this camp. This has caused conflicts between the Military of Chad and the Janjaweed. Today, the Janjaweed are still controlling the borders around the refugee camps and attack civilians on a regular basis.¹²⁷

Other states involved in the conflict are the neighbors of Sudan, Eritrea and the Central African Republic.

Another aspect of the international dimension of the conflict is the interest of the United States and China in Darfur's oil. Due to this interest China does not intervene or pursue the solving of this conflict. Likewise, the United States Congress dismissed a resolution in 2004 in which the Darfur acts were classified as genocide.¹²⁸

Another dimension is the problem of the existence of different rebel groups. So many different rebel groups have emerged over the past years that they are now fighting each other. This is why peace agreements are very difficult to implement and have become rare in recent times. Consequently, these rebel groups are still in conflict with each other.¹²⁹

4.3 The United Nations first attempts to solve the conflict in Sudan in 2004

It was not before 2004 that the United Nations started to intervene in the Sudanese conflict with the UN Security Council Resolutions 1547, 1556 and 1564.

¹²⁶ Frau, 2010: 309f

¹²⁷ Frau, 2010: 310f

¹²⁸ Frau, 2010: 310f

¹²⁹ Frau, 2010: 319

The first resolution (SC/ R 1547) focused more on the situations in South Sudan. Furthermore, the Security Council reminded the different parties of the conflict and fights in Darfur, urging them to find a solution.

The tenor of the second resolution (SC/ R 1556) stated that the conflict is an imminent threat to international peace, security and stability. The central government was requested, as a main responsible noun, to disarm the militia. Furthermore, the resolution called for the Janjaweed to be held responsible for their atrocities.

In the third resolution (SC/ R 1564), the UN Security Council realized that Sudan did not stick to its commitment previously negotiated. The Security Council therefore ordered sanctions upon the Sudanese government. The International Commission of Inquiry on Darfur (ICID) was founded and in its 2005 report it concluded that severe human rights violations and severe violations of international humanitarian law have occurred in Darfur. Genocide was noticed but could not be reported, as there was lack of evidence at this point of time. The International Commission of Inquiry on Darfur recommended passing the case on to the International Criminal Court. As the civil society was the victim of constant aggressions and the Sudanese justice system was unable and indignant to prosecute the persons responsible Article 13 (b) of the Rome Statute would come into effect.¹³⁰

Other resolutions followed demanding an immediate halt of the combats. The Security Council installed the United Nations Mission in Sudan (UNIMIS), which supported the AMIS (African Union Mission in Sudan) and followed the United Nations Advance Mission in Sudan (UNAMIS).

With the Resolution 1672 four individuals from the central government as well as from the rebel groups were sanctioned. Thus the United Nations Member States were obliged to refuse those individuals permission to travel to or through their country and freeze all financial means of those individuals.¹³¹

¹³⁰ Frau, 2010: 318

¹³¹ Frau, 2010: 319

4.4 The assignment of the situation in Darfur to the International Criminal Court with the Security Council Resolution 1593

With the UN Security Council Resolution 1593, Article 13 (b) of the ICC Statute was used for the first time.

This article, as explained before in chapter 3.3.4.2, states the following:

“The International Criminal Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if... situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;”¹³²

Therefore the United Nations Security Council assigned the International Criminal Court with the situation in Darfur in March 2005. The resolution was passed with eleven votes in favor of it and with four abstentions of altogether 15 states voting at the Security Council meeting (the five permanent member states and the 10 non-permanent member states of 2005). It was the United States, China, Algeria and Brazil who abstained their vote. Since Sudan is not a member to the Rome Statute but a member of the United Nations it is bound to this resolution. The International Criminal Court was not bound to the Resolution 1593, but through its referral it allowed the Court to start its proceeding against the atrocious crimes happening in Sudan.¹³³

4.4.1 Background to the Resolution 1593

Resolution 1593 evolved through an appeal from the United States, apparently influenced by Lobbyist groups, to end the “genocide” in Darfur, as the foreign Minister Colin Powell called the ongoing violations of human rights in this region. After the appeal was made the Security Council put an expert commission in charge of the situation. The commission suggested assigning the conflict to the Security Council. Since they were not satisfied with the system of the International Criminal Court, the United States proposed to open another hybrid tribunal or an extension of the Inter-

¹³² Article 13 b Rome Statute, 2002

¹³³ Arieff, Margesson, Browne, & Weed, 2011: 11

national Criminal Tribunal of Ruanda. Nevertheless they did not block the resolution in order not to be responsible for the missing prosecution of this genocide.¹³⁴

4.4.2 Problems of the Resolution 1593

The resolution was not issued without raising significant potential for conflict. Its legitimacy was and is still questioned by scholars today.

4.4.2.1 The lack of a definition of the threat to international peace and security

The formal requirements of Article 27 (3) of the United Nations Charter as well as Chapter VII of the United Nations Charter were properly maintained. However, the question arose whether the conflict in Sudan was a danger to world peace. The Charter of the UN was lacking of a definition what this threat to international peace and security is. The answer to this question could be deducted from the jurisdiction of the International Criminal Tribunal for the former Yugoslavia. As in 2005, the conflict had already spread over the borders to Chad. This key element of an international conflict was fulfilled.¹³⁵

4.4.2.2 The mission of mentioning a legal basis for the resolution

One problem of Resolution 1593 is the missing reference of its legal basis, namely Article 13 b of the Rome Statute. With the method of interpretation of law it is nevertheless clear that the Security Council was acting under this article.¹³⁶

4.4.2.3 Exclusion of a certain group of people in the resolution

Another point, which leaves room for discussion, is the fact that resolution 1593 excludes a certain group of people as paragraph 6 of the resolution determines:

„that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized

¹³⁴ Frau, 2010: 323f

¹³⁵ Frau, 2010: 326

¹³⁶ Frau, 2010: 327

*by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;*¹³⁷

A main critic point of the resolution is therefore the fact that this paragraph was amended by the United States. The US included this paragraph in order to make sure that the International Criminal Court would not have jurisdiction over people of non-member state parties, such as themselves.

Other voices arose that it is a neo-imperialist method to judge over people of weaker countries. The accusation that this paragraph is against the principle of equality, and thus an example for selective justice is highly discussed.¹³⁸

4.4.3 The cooperation requirement in Resolution 1593

The cooperation between the International Criminal Court, the prosecutor and the government of Sudan is essential to the ICC's work. This can only be assured through resolution 1593, as it states an obligation to work together and to give any support needed in its second paragraph. The amount of cooperation is assumed to be the same as if Sudan were a member state to the ICC statute. Rebel groups are obliged to cooperate as much as possible.¹³⁹

4.4.4 The legal consequence of Resolution 1593

One of the legal consequences of Resolution 1593 was that Sudan had to endure interventions in its penal power. It was strictly obligated to cooperate with the organs of the International Criminal Court. One ought to bear in mind that Sudan could still prevent the ICC's work if it hinders it through the principle of complementarity. Technically Sudan could start its own inquiry of the Darfur conflict and prosecute criminals in its national criminal courts. Then the International Criminal Court could suspend its investigations for some time and monitor the national judicial process.¹⁴⁰

4.5 The arrest warrant of Omar Al Bashir

Omar Hassan Ahmad Al Bashir, born 1 January 1944, has been the president of the Republic of Sudan since 1993. The international community considers him as the

¹³⁷ S/RES/1593, 2005: 6

¹³⁸ Frau, 2010: 329f

¹³⁹ Frau 2010: 334f

¹⁴⁰ Frau 2010: 338f

head of state as the man in charge of the ongoing Darfur conflict. The prosecutor of the International Criminal Court Luis Moreno Ocampo brought the prosecution application for a warrant of arrest forward on 14 July 2008. It was followed by the first warrant of arrest on 4 March 2009 and a second warrant of arrest on 12 July 2010 by the Pre-Trial Chamber I. These warrants of arrests list ten counts on the basis of his individual criminal responsibility under Article 25 (3) (a) of the ICC Statute as an indirect perpetrator or co-perpetrator.

Those counts are:

- crimes against humanity as;
 - murder,
 - extermination,
 - forcible transfer,
 - torture and
 - rape,
- two acts of war crimes;
 - intentionally directing attacks against a civilian population as such or against individual civilians not taking part hostilities and
 - pillaging
- and three counts of genocide as stated in Article 6 of the Rome Statute:
 - by killing;
 - by causing serious bodily or mental harm
 - by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction.¹⁴¹

The Bashir case is not the first case brought to the International Criminal Court involving Sudan or an arrest warrant for a government official. But it is the first arrest warrant from the International Criminal Court prosecutor for a current head of state. As it is based on a United Nations Security Council Resolution it engages the international community.¹⁴²

This case is particularly interesting because it will be precedence to the handling of the sovereign immunity for heads of state and a characterization of genocide in Su-

¹⁴¹ ICC-CPI, 2012

¹⁴² Slomanson, 2008: 1f

dan. Sudan's government protested against the International Criminal Court prosecutions of Sudanese officials arguing that it has not ratified the Rome Statute. Article 12 of the Rome Statute states that the prosecuted person must be a national of a state that is *either* a party to the statute; or alternatively,

*"by declaration lodged with the Registrar, [a non-party State] accept[s] the exercise of jurisdiction by the Court with respect to the crime in question."*¹⁴³

For example, the International Criminal Court argues that through Article 13 (b) of the Rome Statute it can demand the UN Security Council to refer a case over to them. This is the case if a situation is not properly investigated or prosecuted by the relevant government. This exactly happened in Sudan as the International Criminal Court Prosecutor Luis Moreno Ocampo describes in a speech on the 5789th Security Council Meeting on 5 December 2007:

*"the Government of the Sudan is not cooperating with the Court ...is not complying with Resolution 1593 ... [and] does not recognize the jurisdiction of the Court ... over Darfur."*¹⁴⁴

On 21 August 2008 the Sudanese President Al-Bashir responded he is unwilling to accept the ICC's proceedings of the alleged crimes against humanity and war crimes in Sudan. Should the ICC decide to proceed to issue the arrest warrant against him anyway, he will expel all member states of the United Nations and the African Union from Sudan. Nowadays just a very small number of peacekeeping forces are stationed in Sudan.¹⁴⁵

4.5.1 Problems of the indictments

The immunity of head of states is clearly excluded in Article 27 of the Rome Statute. Nevertheless, the Bashir case is the first case where a current president of a country is indicted. The African Union criticized this warrant of arrest as a mean of discharging other disliked head of states in Africa. Thus the problem of immunity is still to be discussed, as there are no precedent cases in public international law.

¹⁴³ Slomanson, 2008: 2f

¹⁴⁴ Security Council, 2007

¹⁴⁵ Slomanson, 2008: 3f

Others represent this in the way that the state immunity should not be used in international criminal law. This and other reasons lead to the conclusion that Omar Al Bashir has no immunity before the International Criminal Court.¹⁴⁶

4.6 Status of the case today

Today, Omar Al Bashir is still the President of the Sudan. He has not been overcome by another government and has not fled into exile to Saudi Arabia or any other country. Just recently Bashir visited Malawi, a signatory state to the Rome Statute, which failed to arrest him, as it was not their “business” to do so.¹⁴⁷

Bashir’s reaction to his arrest warrant was ambiguous. On the one hand he said in an interview with the Guardian that he takes full responsibility for the conflict:

*“Of course, I am the president so I am responsible about everything happening in the country.”*¹⁴⁸

On the other hand he accused the International Criminal Court of double standards and a campaign of lies to force a quick regime change. Furthermore he argues that the western media has exaggerated the numbers. His government counts no more than 10.000 deaths and only 700.000 displaced persons.¹⁴⁹

4.7 Conclusion

Summoning up, the case of Omar Al Bashir highlights two important aspects. On the one hand it shows the difficulties the International Criminal Court has to face regarding the Bashir case. On the other hand it points out how the UN Security Council and the ICC can work together to fight against impunity of perpetrators of international crimes.

To my mind the prosecution of Bashir has failed its effects up until today because the ICC’s power is limited regarding its enforcement mechanisms. The following three outcomes could lead to a prosecution of Omar Al Bashir:

1. Bashir surrenders himself to The Hague, which is implausible.

¹⁴⁶ Frau, 2010: 353f.

¹⁴⁷ BBC, 2011

¹⁴⁸ BBC, 2011

¹⁴⁹ Tisdall, 2011

2. He makes a mistake, for example by traveling to a country that will extradite him to The Hague.
3. The Sudanese people dispossess- and indict him either in Sudan or extradite him to The Hague.

In my opinion it is important that the acceptance and the cooperation of the International Criminal Court from other states, especially the African Union, will be strengthened in order to progress the courts works.

As it was the first case making use of Article 13 (b) of the Rome Statute, the Bashir case in particular demonstrates the effective cooperation between the UN Security Council and the Court. I believe this process ought to continue, as it is a method of prosecuting accused persons of non-member state parties.

5 The International Criminal Tribunal for Rwanda as a pioneer to the International Criminal Court

In this chapter I will outline the history of the genocide in Rwanda, the establishment of the International Criminal Tribunal for Rwanda (ICTR) and two exemplary successful convictions from the ICTR. Both had precedent decisions for the International Criminal Court.

The first case is the one of Jean Paul Akayesu, the former mayor of the Taba commune. Not only was he the first individual to be prosecuted for the crime of genocide, but also that sexual crimes, as had been committed in Sudan, were taken into the crime of genocide.

The second case concerns Jean Kambanda, the prime minister of Rwanda at the time of the genocide. He was the first head of state who was convicted by an international court. He was also the first accused person pleading guilty and therefore with his testimony helped to conclude many other cases.

Both these ICTR cases are precedence to the Bashir case. The immunity of a former head of state did not count in the conviction of Kambanda and the prosecuted crimes of Akayesu show a similarity to the ones happened in Sudan.

5.1 Differences between the ICTR and the ICC

The International Criminal Tribunal for Rwanda is a precursor to the International Criminal Court. The composition of the ICTR is to a great extent similar to that of the ICC and therefore I will not go into detail.

The International Criminal Court acts strictly according to the principle of complementarity. As explained in Chapter 3.3, this implies that the ICC can take action only if national courts are unable or unwilling to investigate or prosecute crimes of international concern. The International Criminal Tribunal for Rwanda on the other hand obeys the principle of primacy. The ICTR statute therefore constituted a concurrent jurisdiction to the national court, as it would have been impossible to prosecute the potential suspects solely by means of the ICTR.¹⁵⁰

¹⁵⁰ Heeck, 2006: 368f

Overall the court system of the International Criminal Court has advantages to the International Criminal Tribunal for Rwanda. It has changed for the better: victims, witnesses as well as the suspects have more rights at the International Criminal Court.

Another difference is that at the International Criminal Tribunal for Rwanda, the prosecutor has the competence to arrest suspects whereas arrest warrants from a judge are necessary to arrest someone at the International Criminal Court.¹⁵¹

5.2 The Rwanda conflict

5.2.1 The history of the conflict of Rwanda

The conflict is based on the ongoing displacement of the Tutsi population. The Tutsi constituted the nobility who used to rule over the more numerous and poorer Hutu ethnicity. The tensions began to arise in the phase of decolonization in the late 1950ies. The Tutsi resisted the process of democratization whereas the Hutu's political movement gained power and privileges. This started the "social revolution" lasting from 1959 until 1961. Due to this power struggle many Tutsis had to take refuge in neighboring countries to escape the increasing assaults from the Hutu population. The Hutus were able to gradually take over power because of the ongoing displacement of the Tutsi. By the year 1990 around 200.000 refugees were counted in Uganda.¹⁵²

In 1987 the Tutsi refugees created the Rwandan Patriotic Front (RPF) from their exile in Uganda. This was a political and military movement with the purpose to secure repatriation of Rwandans in exile and to reform the Rwandan government. Many attacks against the Hutu government were launched from Uganda. These aggressions lasted until 1993 and were interrupted with the signing of the Arusha peace agreement and the installment of the United Nations Assistant Mission for Rwanda (UNAMIR) through the UN Security Council. The UNAMIR had a two years mandate to ensure the implementation of this agreement. A government coalition between the Tutsi and the Hutu, as demanded in the agreement, never came into action.¹⁵³

¹⁵¹ Heeck, 2006: 368f

¹⁵² UN - Prevention of Genocide, 2011

¹⁵³ UN - Prevention of Genocide, 2011

On 6 April 1994 the conflict escalated again. The airplane carrying the head of state of Rwanda, Juvenal Habyarimana, and the president of Burundi, Cyprien Ntaryamira, was shot down while approaching the Rwandan capital, Kigali. This incident led to a massacre from the Hutu population group against their rival population group, the Tutsi. Without any evidence or confession the Hutus accused the Rwandan Patriotic Front of shooting the plane down.¹⁵⁴

After the plane crash the Hutu government started to create death lists and concentrated their troops. The systematic massacres were acted out by the Rwandan army, the president's guards, the national police ("gendarmerie"), special trained militia and the Hutu civil society. In this genocide between 800.000 and one million people got killed during a short period of time. An estimated 150.000 and 250.000 women were sexually abused. On 18 July 1994 the war was ended by the RPF marching into Kigali. They formed a coalition government.¹⁵⁵

5.2.2 The international community in the conflict

As a consequence of the murder of ten Belgian peacekeepers the UN Security Council withdrew most of the United Nations troops stationed in Rwanda on 21 April 1994. However as the massacres continued, the Security Council decided to stock up the existing 500 blue helmet troops to 5500 UN soldiers (UNAMIR II). Unfortunately this decision was made as late as 17 May 1994. Furthermore, also a lack of troop and material did not allow the dispatch of that many soldiers by the United Nations Member States. Therefore France decided to intervene, which was granted by the Security Council through Resolution 929 on 22 June 1994. This mission, called 'Operation Turquoise', employed 2,500 French and Senegalese troops. They started to build up safe humanitarian zones in the Southwest of the country and saved hundreds of civilians.¹⁵⁶

5.3 The International Criminal Tribunal for Rwanda

The International Tribunal for Rwanda (ICTR) got inaugurated through the United Nations Security Council Resolution 955 in 1994 as an ad hoc tribunal located in Arusha, Tanzania. Its organization is regulated by the Statute of the International

¹⁵⁴ Heinsch, 2007: 70

¹⁵⁵ Heinsch, 2007: 71f

¹⁵⁶ UN - Prevention of Genocide, 2011

Criminal Court for Rwanda and by the Rules of Procedure and Evidence. It was established to judge the genocide and other atrocities that happened in the Rwanda conflict. There was hope that the tribunal would contribute 'to the process of national reconciliation'.¹⁵⁷

5.3.1 The establishment of the ICTR

In July 1994 the United Nations installed an expert commission on the basis of Resolution 935. The expert commission was to examine the breaches against international criminal law and genocide during the conflict of Rwanda. It suggested bringing the responsible persons before an independent and impartial international court similar to the International Criminal Tribunal for the former Yugoslavia. Rwanda's newly formed government was at first in favor for such a court. It later rejected the Resolution 955, as detailed in Chapter 5.3.3. The expert commission came to the conclusion that crimes against humanity and grave breaches against international criminal law had happened on both sides. Furthermore they decided that only the genocide against the Tutsi through the Hutus could be proved, but not vice-versa.¹⁵⁸

As a consequence of the recommendation of the expert commission the UN Security Council created on the basis of Resolution 955 on 8 November 1994 the "*International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994*".¹⁵⁹

In this resolution 955 the Security Council came to the conclusion that the situation posed an ongoing threat to international peace and security. Therefore, Chapter VII of the United Nations Charter was the basis of the founding of the ICTR.¹⁶⁰

5.3.2 The jurisdiction of the ICTR

The ratione materiae of the International Criminal Tribunal for Rwanda is stated in the Statute of the ICTR. On this basis the crimes of genocide, crimes against humanity

¹⁵⁷ S/ Res 955, 1994

¹⁵⁸ Heinsch, 2007: 73f

¹⁵⁹ S/ Res 955, 1994

¹⁶⁰ Heinsch, 2007: 73f

as well as violations of Article 3 common to the Geneva Conventions and Additional Protocol II can be prosecuted.¹⁶¹

The ratione temporis of the ICTR is the period of crimes that happened from 1 January 1994 to 31 December 1994.¹⁶²

The ratione personae and the ratione loci (territorial limitation) are also determined in the Statute of the ICTR. According to the Statute the court has jurisdiction over crimes committed by Rwandans in the territory of Rwanda and in the territory of neighboring states, as well as crimes committed by non-Rwandan citizens in Rwanda

Article 8 (1) of the ICTR Statute states that the International Criminal Tribunal for Rwanda and the national court of Rwanda shall have concurrent jurisdiction over the crime of genocide. However, according to Art 8 (2) of the ICTR Statute the ICTR has primacy over Rwanda's national court's jurisdiction and can request national courts to defer to its competence.¹⁶³

5.3.3 Rwanda and the rejection of Security Council Resolution 955

Rwanda's new government saw the need to establish an international criminal court. It accepted that only an international tribunal could guarantee impartial and fair trials to prosecute those responsible for genocide and crimes against humanity. Since Rwanda held a seat in the UN Security Council at that time, the government asked the Security Council to create a court similar to the International Criminal Tribunal for the former Yugoslavia. Surprisingly Rwanda's government rejected the Resolution 955, which instituted the tribunal.¹⁶⁴

This was due to several reasons, highlighted by Oliver Dubois, a legal adviser on international humanitarian law:

- First the time limit failed to satisfy Rwanda's newly formed government: only acts that happened during the year 1994 rather than from 1990 onward were to be punished. This decision was incomprehensible for the current government, as they considered the time from 1990 until 1993 the planning period

¹⁶¹ Murungu & Biegon, 2011: 224f

¹⁶² Murungu & Biegon, 2011: 224f

¹⁶³ Murungu & Biegon, 2011: 225f

¹⁶⁴ Beigbeder, 1999: 176

leading to the genocide. In their opinion the violations during that period should be prosecuted as well, even though no large-scale massacres took place.

- The limited number of criminal chambers also posed a problem. The government believed that two chambers would not suffice to cover the amount of cases to be handled at the court.
- Furthermore the structure of the court was criticized, because the prosecutor as well as the appeal chamber was common to the International Criminal Tribunal for the former Yugoslavia, which the government thought was inadequate.¹⁶⁵
- Rwanda disapproved with the exclusion of the death penalty as a maximum sentence. As the death penalty was in force in their national penal code and thus could be applied to verdicts on national level, were higher ranking criminals would flee from this sentence to the ICTR.
- The government of Rwanda opposed to instating the court in Tanzania as the court was to play an important role for the Rwandan population in preventing further crimes and dealing with the ones that had happened.¹⁶⁶
- Rwanda could not accept that countries, which had previously supported the former regime, would now have the possibility to nominate judges.
- Finally, Rwanda criticized that persons convicted by the tribunal would be imprisoned in third countries.¹⁶⁷

After voting against the Statute of the International Criminal Tribunal for Rwanda the government nevertheless assured that it would cooperate with the court once it was established.

5.3.4 International cooperation with the tribunal

Given that the Resolution 955 is compulsory for all UN Member States, the Statute of ICTR obligated United Nations Member States to cooperate with the court. It obliged

¹⁶⁵ Heinsch, 2007: 78f

¹⁶⁶ Dubois, 1997

¹⁶⁷ Dubois, 1997

all Member States to follow the tribunal's orders in identifying, arresting, detaining and surrendering accused persons. If a state were not to comply, the prosecutor could report that state to the Security Council, who can take measures.

Until today many member states have assisted the tribunal. They provided prison facilities, financial and material donations and arrested accused person within their states. Those countries helped tremendously to bring the witnesses to Arusha. Special travel documents were given to them so they could testify in the court.¹⁶⁸

5.4 Examination of two successful cases of the ICTR

5.4.1 The Akayesu case

The first judgment of the International Criminal Tribunal for Rwanda was the one of the former mayor (French: bourgmestre) of the Taba Commune Jean-Paul Akayesu. The verdict of this case had a great influence on the development of international criminal law, as I will describe below.

5.4.1.1 The case

Jean Paul Akayesu was born in Rwanda in 1953. He was a founding member of the Mouvement Democratique Republique (MDR) and was the mayor of the Taba commune in April 1993 until June 1994. In this official post he was responsible for protecting the rule of law and public order in the Taba commune. The communal police and gendarmes were under his control. People followed his orders exclusively as he was a well-respected man in his position. The ICTR stated in their judgment that at least 2000 Tutsis were killed in the Taba commune. At first Akayesu tried to prevent the killings but it is a well-known fact that he later participated in the atrocities.¹⁶⁹

The Chamber also noted that

Without being a senior government official, his status as bourgmestre made of Akayesu the most senior government personality in Taba and in this capacity he was responsible for protection of the population and he failed in this mission. He publicly incited people to kill in Taba. He also ordered the killing of a number of persons some of whom were killed in

¹⁶⁸ UNICTR (a), 2011

¹⁶⁹ Amann, 1999: 195f

*his presence and he participated in the killings. He also cautioned and supported through his presence and acts, the rape of many women at the bureau communal.*¹⁷⁰

5.4.1.2 The conviction

Akayesu was convicted on 2 September 1998 by the Trial Chamber I. for genocide, direct and public incitement to commit genocide and crimes against humanity (including murder, torture, rape and other inhumane acts). This was due to the fact that he had been controlling the police and security. 42 witnesses were heard in this first concluded trial by the ICTR. For his crimes he got a life sentence.

5.4.1.3 Significance of the case

This judgment was a historic precedent with fundamental significance to international criminal law, as explained below.

First conviction of the crime of genocide

On the one side it was the first conviction for the crime of genocide. The trial chamber I. had to determine whether or not the definitions of genocide of the ICTR statute were fulfilled. It confirmed the existence of individual criminal responsibility for the crime of genocide, nearly 50 years after the Genocide Convention had been adopted. Furthermore the offence of incitement of genocide got elaborated through the judgment. The judges came to the conclusion that the direct and public incitement, provoking perpetrators to commit genocide, is to be punished in such a serious crime as genocide.¹⁷¹

First time sexual crimes were taken into the crime of genocide

On the other side it was the first time that sexual crimes were included into the crime of genocide. Thus rape, sexual violence against woman and other forms of sexual abuse had been part of the genocide in Rwanda.¹⁷²

Woman had been systematically targeted during this genocide but ever since this judgment rape can finally be punished as a crime of war. The most vulnerable victims

¹⁷⁰ Case No: ICTR-96-4-T, 1998

¹⁷¹ Sato, 2002: 44f

¹⁷² Behrendt, 2005: 212f

now had full protection from the Court, as it defined rape as “a physical invasion of a sexual nature committed on a person under circumstances which are coercive.” With this definition the International Criminal Court of Rwanda conceptualized this crime against woman, which is now treated with the same seriousness as other outrageous violations of international law.¹⁷³

5.4.2 The Kambanda Case

The other important verdict of the International Criminal Court for Rwanda was the one of the former prime minister of Rwanda, Jean Kambanda, on 4 September 1998. This sentence had another tremendous significance for the development of international criminal law and laid the basis for the case of Omar Al Bashir before the International Criminal Court.

5.4.2.1 The case

Jean Kambanda, born 10 October 1955, got adjudged from the International Criminal Tribunal for Rwanda on 4 September 1998. Kambanda had been the prime minister of Rwanda from 7 April 1994, after the president Habyarimana died in the plane crash, until 17 July 1994 when he fled to Kenya. Carla del Ponte, the chief prosecutor of the ICTR at that time, made a plea agreement with him. Thus Kambanda provided evidence against other criminals to mitigate his sentence. He pleaded guilty of the following crimes: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide and crimes against humanity (murder and extermination).¹⁷⁴

5.4.2.2 The conviction

Nevertheless Kambanda was sentenced to the maximum penalty of life imprisonment due to his overwhelming responsibility for hundred thousands of deaths. As Prime Minister, Jean Kambanda promoted the massacre during public appearances and also distributed weapons. According to the judges his ruefulness had come too late and was therefore not trustworthy. Kambanda appealed this sentence but did not succeed.¹⁷⁵

¹⁷³ Sato, 2002: 44f

¹⁷⁴ Behrendt, 2005: 213f

¹⁷⁵ Behrendt, 2005: 213f

5.4.2.3 Importance of the case

Kambanda was the first head of state who pleaded guilty in an international criminal tribunal and also the first to be convicted. He accepted his full responsibility for the crime of genocide. His confession revealed to the judges what had really happened in Rwanda and provided the judges with facts on which they could rely on with their prosecution against the former prime minister and other perpetrators. Kambanda's guilty plea proved that the Hutu-dominated government had systematically planned the eradication of the Tutsi population.

The court hoped that Kambanda's guilty would encourage other individuals to admit their responsibilities in the genocide before a court.

Kambanda's conviction by an international criminal court sent a clear message to whoever commits serious crimes of international criminal law, as they will be brought to justice.¹⁷⁶

5.5 Relevance of the ICTR for peace and justice

Dictatorships relied on the weakness of the judicial institutions in their countries and could therefore take necessary actions to stay in power. International criminal tribunals help to avoid a recurrence of genocide, as potential perpetrators fear those superior judicial institutions.¹⁷⁷

Usually individuals in power or authorities can in practice commit genocide and crimes against humanity. The International Criminal Tribunal for Rwanda, as well as the International Criminal Tribunal for the former Yugoslavia, brought high-ranking individuals for gross violations of human rights before an international court to justice. The ICTR therefore presented an evolution of political and legal accountability and laid the basis for the International Criminal Court. It is a good example for the prosecution of crimes happened in other parts of the world, where such atrocities were committed.¹⁷⁸

My examination of other cases of the International Criminal Tribunal for Rwanda concluded that a great cooperation of African countries happened. This political, moral

¹⁷⁶ Sato, 2002: 47f

¹⁷⁷ UNICTR, 2011

¹⁷⁸ UNICTR, 2011

and material support helped tremendously in arresting accused persons. They have been transferred from more than 15 countries and many countries did not allow accused persons to enter their territory. In 1999 the Republic of Mali was in the first country to offer prison facilities for ICTR convicts. Until today the ICTR has signed agreements concerning this matter with various countries, including Benin, Senegal, Swaziland, Rwanda, Italy, France and Sweden.

The International Criminal Tribunal for Rwanda provides excellent precedents for the International Criminal Court and some national jurisdictions. It therefore made an essential contribution to international peace and justice.¹⁷⁹

5.6 Conclusion

The International Criminal Tribunal for Rwanda was established in 1994 through the UN Security Council Resolution 955 based on Chapter VII of the UN Charter in order to contribute to the peace building processes and to law enforcement in Rwanda. This was essential as the genocide posed a threat to international peace and security.

The court faced various problems in the beginning, such as financial burdens, high levels of bureaucracy, a difficult recruiting process and the lack of cooperation of states. However, it commenced its work one year after the establishment and was able to prosecute many criminals until today. Those cases will have an influence on future court decisions and might help to prevent such atrocities as happened in Rwanda.

The Ayayesu case set precedence as it was the first time that someone was convicted of genocide and also the first time that sexual violence was part of this crime. Subsequently, the importance of condemning gender-specific crimes got international attention. The testimony of Kambanda eliminated all doubts whether genocide took place in Rwanda. It clearly proved that eradication of the Tutsi was a policy of the government. Another important message of the International Criminal Tribunal of Rwanda is that no one is immune against the crime of genocide and other serious crimes of international law and will be brought to justice.

¹⁷⁹ UNICTR, 2011

Rwanda established national courts as well as the “Gacaca courts” (an indigenous for restorative justice) to prosecute all other offenders. This was an important measure as the ICTR was established to bring only the individuals with the greatest responsibility of genocide to justice. The “smaller fry” were to be condemned as well, but this would have exceeded the ICTR’s work. Therefore it is essential that the national judicial system is strengthened.

Needless to say, the judgments of the International Criminal Tribunal for Rwanda contributed to the peace building process and to international criminal law being further recognized. The ICTR paved the way for the Rome Statute and thus made an important step towards worldwide recognition of criminal accountability.

6 The principle of universal jurisdiction

The practice of universal jurisdiction is highly questioned by governments and international law experts. There is an ongoing discussion and confusion about its concept, scope and application. I will address this issue by explaining the judicial concept of the principle of universal jurisdiction.¹⁸⁰

The debate on the universal jurisdiction is a clash between legal principles. On the one hand the principle of sovereignty and on the other the principle of individual responsibility for international crimes.¹⁸¹

The basic idea of this principle is that any national legal system can prosecute perpetrators of the worst crimes of international law universally. Therefore, it could represent an alternative or an addition to the International Criminal Court as a way to fight impunity. This is also a crucial point to this thesis.

6.1 History of universal jurisdiction

The history of international crimes is dating back to piracy crimes around the 16th century, which have been '*hostis humani generis*' (so in Latin called: enemies of mankind). These crimes were allowed and mandated to be prosecuted by any state. The crime of piracy is and has always been an international offence.¹⁸² Piracy therefore presents the oldest offence with universal jurisdiction.¹⁸³

6.1.1 The Adolf Eichmann case

An early case of universal jurisdiction is the process of Adolf Eichmann in 1961. He was a German Nazi war criminal and also one of the leaders responsible for the Holocaust. He was abducted from his exile in Argentina by Mossad operatives (an Israeli Intelligence Agency) and brought to Israel. There he was charged with crimes against humanity and war crimes by the District Court of Jerusalem and executed by hanging in 1962.¹⁸⁴

¹⁸⁰ Yee, 2011:1f

¹⁸¹ Coombes, 2011: 423

¹⁸² Chehtman, 2010: 90f

¹⁸³ Berg, 2010: 67f

¹⁸⁴ The Nizkor Project, 1999

6.1.2 The Augusto Pinochet case

Another precedent of universal jurisdiction is the case of Augusto José Ramón Pinochet Ugarte. The former Chilean dictator was arrested in London on 17 October 1998 because of an international arrest warrant, which had been issued by the Spanish judge Baltazar Garzón on the ground of alleged torture. This was the first arrest of a former head of state based on the principle of universal jurisdiction. The case was decided under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The majority of the U.K. House of Lords decided that Pinochet, as a former head of state, could be extradited to Spain, for alleged torture committed in Chile against nationals and non-nationals of the third state while the accused held office.¹⁸⁵

Other states, including Austria, Belgium, Canada or Germany proceeded in various cases on the basis of universal jurisdiction.

However, the Pinochet case inspired the advocates of the victims of human rights abuses by the former dictator of Chad, Hissène Habré, to file a criminal complaint in 1999 in Senegal, where he lived in exile.¹⁸⁶

We are going to focus on the Hissène Habré case in chapter 7 of this thesis. This case is an example of the difficulties and prospects of universal jurisdiction. Firstly, however, I will present the concept, scope and problems of the principle of universal jurisdiction.

6.2 The concept of universal jurisdiction

Hon. Mary Robinson, the former United Nations High Commissioner of Human Rights, explains the concept in the foreword of the Princeton Principles on universal jurisdiction (those are guidelines worked out in 2001 by a group of experts in Princeton to define some basic rules for its application):

“The principle of universal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled- and even obliged- to bring proceedings against the perpetra-

¹⁸⁵ Coombes, 2011: 431

¹⁸⁶ Kraytman, 2005: 116f

tor, regardless of the location of the crime or the nationality of the perpetrator or the victim.”¹⁸⁷

6.2.1 Scope of the application of universal jurisdiction

Today the scope of universal jurisdiction can be justified in a state’s judicial system via three ways of handling its application:

- through the implementation of universal jurisdiction in national law,
- through the obligation of the use of universal jurisdiction in treaties or
- through the existence of universal jurisdiction in customary international law.

6.2.1.1 Implementation of universal jurisdiction in national law

Universal jurisdiction norms can be implemented into the criminal code of a state and therefore become national law. This gives domestic courts the power to enact universal jurisdiction over certain international crimes. The so-called universal jurisdiction norms vary between national legal systems. To this day, many states have implemented universal jurisdiction norms in some way or other. Most notably Spain and Belgium are the pioneers of the implementation of a broad universal jurisdiction regulation in their national law.¹⁸⁸

6.2.1.1.1 New restrictions on already implemented universal jurisdiction laws

In the past years some states amended their extensive universal jurisdiction norms and limited these laws due to political pressure and criticism claiming that universal jurisdiction norms were too broad. Critics feared an abuse of these norms.¹⁸⁹

Belgium, for instance, installed an extensive law on universal jurisdiction in 1993. However, it was amended in 2003 to the extent that perpetrators of the worst crimes had to be either Belgium citizens or reside in Belgium to be prosecuted.¹⁹⁰

¹⁸⁷ Macedo, 2001: 16

¹⁸⁸ Yee, 2011

¹⁸⁹ Morrison & Weine, 2010: 6

¹⁹⁰ Morrison & Weine, 2010: 7

Spain modified its criminal statute in 2009, narrowing down the scope of universal jurisdiction, which had been one of the broadest in Europe until then.¹⁹¹

Canada has implemented universal jurisdiction norms in its criminal code. However, Canadian law requires that the Attorney General or Deputy Attorney General must personally approve all claims based on universal jurisdiction, in order to be introduced to a court.¹⁹²

In 2010, Britain amended its universal jurisdiction law with the Police Reform and Social Responsibility Act. Before the amendment every citizen could file a complaint for human rights offences to a British magistrate, which could therefore issue an arrest warrant without consulting the British government. Nowadays private individuals are required to obtain the consent of Britain's director of public prosecutions.

The British Ambassador to Israel, Matthew Gould, stated that

*“The change will ensure that people cannot be detained when there is no realistic chance of prosecution, while ensuring that we continue to honor our international obligations.”*¹⁹³

6.2.1.2 Obligation of the use of universal jurisdiction in treaties

Several multilateral treaties oblige state parties to grant national jurisdiction over non-nationals in extraterritorial crimes. Therefore they comply with the universal jurisdiction principle. Those treaties contain obligations for their respective state parties to either prosecute or extradite (*aut dedere aut judicare principle*) perpetrators of acts that are prohibited by this treaty. This leads to the application of universal jurisdiction.¹⁹⁴

However, some legal issues have to convene for a state to act under the principle of universal jurisdiction:¹⁹⁵

¹⁹¹ Morrison & Weine, 2010: 8

¹⁹² Morrison & Weine, 2010: 7

¹⁹³ Bellinger, 2011

¹⁹⁴ Berg, 2010: 94f

¹⁹⁵ Amnesty International, 2011: 16f

1. the state has defined a crime under international law, such as torture or crimes against humanity, as a crime in its criminal code or in its national legal system
2. the state gave its courts the power to have jurisdiction over crimes where there is a ratified treaty obligation to prosecute.
3. the perpetrator of the allegedly committed crimes is present in the country.

This treaty practice is nonetheless limited to the particular treaty regime and has to be evaluated separately for each treaty and each signatory state.

Those treaties are for instance:¹⁹⁶

- The 1949 Geneva Conventions
- The 1954 Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict
- The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking Convention)
- The 1971 Aircraft Sabotage Convention
- The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents
- The 1973 Convention for the Suppression and Punishment of the Crime of Apartheid
- The 1979 International Convention Against the Tacking of Hostages
- The 1977 Additional Protocol I to the Geneva Conventions
- The 1982 Third United Nations Convention on the Law of the Sea
- The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- The 1988 Airport Security Protocol
- The 1988 Maritime Terrorism Convention
- The 1994 Convention on the Safety of United Nations Peacekeepers
- The 1998 International Convention for the Suppression of Terrorist Bombings

¹⁹⁶ Amnesty International, 2011: 17

6.2.1.3 Exercise of universal jurisdiction through customary international law

The application of universal jurisdiction has also emerged over the years through customary international law. Legal theorists agree that universal jurisdiction finds application to the crimes on piracy, slavery, war crimes, genocide, crimes against humanity, apartheid and torture regardless of whether a state has ratified a specific treaty or incorporated the specific crime into its national legislation. However, some states disagree with those legal theorists. China, for instance, accepts universal jurisdiction only for the crime of piracy. This leads to the discussion to which extent universal jurisdiction exists in customary international law.¹⁹⁷

As M. Cherif Bassiouni notes:

*“Bearing in mind that there are 189 member states of the United Nations and 195 countries, it is necessary to assess whether the relatively recent enactment of a few states are sufficient to establish a principle of customary international law of universal jurisdiction over war crimes, crimes against humanity, and genocide, to single out the three crimes within the jurisdiction of the ICTY, ICTR, and ICC, and which all writers supporting universality maintain are the three crimes that call for universal jurisdiction.”*¹⁹⁸

6.2.2 What makes an offense applicable to universal jurisdiction?

Adeno Addis, a professor of public and constitutional law at Tulane University, describes what makes an offence applicable to universal jurisdiction. In his article „Imagine the international community: The constitutive dimension of universal jurisdiction” he explains various theories, relating to the possible application of universal jurisdiction. Some of these theories are listed below.¹⁹⁹

- „The power of practice“: The international community has pointed out that either customary law or a countries’ legislation has to provide for the penalization of such atrocious offences.

¹⁹⁷ Coombes, 2011: 432

¹⁹⁸ Bassiouni M. C., 2001: 135f

¹⁹⁹ Adeno, 2009: 151f

- „The heinousness of the crime“: The offence is so heinous that it moves everyone deeply and to such a degree that every state has to condemn the offender.
- „The probability that the particular crime would go unpunished (the desire of a „no law-free zone)“: Some crimes could remain un-punishable if no system can be found to prosecute offenders of such crimes. Therefore if such a system is not established, it could lead to an acceptance of those crimes.
- „The fundamental nature of the norm is threatened by these crimes“: the offence violates fundamental norms, the so-called *jus cogens* norms.

6.2.3 Crimes dealt with universal jurisdiction

The debate about which crimes the universal jurisdiction doctrine should have this kind of exceptional jurisdiction has been going on for a long time. I will detail the crimes that qualify for its application in the following sub-chapters.

6.2.3.1 Piracy

It is widely acknowledged that the crime of piracy applies to universal jurisdiction. Through its long lasting application its exercise is well established. The prevention and suppression of piracy is a common interest.²⁰⁰

In 1820, for example, in the case *United States v. Smith*, the United States Supreme Court confirmed the application of universal jurisdiction by U.S. courts over piracy by stating that “*pirates being hostis humani generis [enemies of all mankind], are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual defense and safety of all.*”²⁰¹

Article 19 of the 1958 Geneva Convention on the High Seas and Article 105 of the 1982 United Nations Convention on the Law of the Sea the principle of universal jurisdiction explicitly applies to piracy by stating that:

„On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the per-

²⁰⁰ Berg, 2010: 66f

²⁰¹ Scharf, 2001: 374

*sons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.*²⁰²

6.2.3.2 War crimes and crimes against humanity

Throughout the past century, especially in the aftermath of World War II, human right advocates have promoted the extension of the universal jurisdiction principle to war crimes and crimes against humanity.

Major Willard Cowles, who served in the judge advocate office during the Second World War, argues why war criminals have the same international jurisdiction as pirates. He states that the 20th century legal concept of the war criminal derives from the ancient practice of brigandage. As brigandism, he explains, piracy lacks governmental control, political order and law enforcement. This happens mostly in times of war. The missing of a controlled judicial system is the association between piracy and brigandism. Just as brigands, war criminals take this advantage and commit their crimes in knowing the impunity of it.²⁰³

In 1949 the four Geneva Conventions, which are universally ratified today, have laid the legal basis for the extension of universal jurisdiction to war crimes and crimes against humanity. They require states to establish and to exercise universal jurisdiction over the crimes defined in it.

For example Convention IV states in Article 1

*The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.*²⁰⁴

And Article 2 of the same Convention states that

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of

²⁰² Article 19 Geneva Convention, 1949

²⁰³ Chehtman, 2010: 90f

²⁰⁴ Article 1 Geneva Convention, 1949

*any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.*²⁰⁵

However, the use of universal jurisdiction in the various cases following World War II clearly pointed out the application to war crimes and crimes against humanity in the future.

6.2.3.3 Torture, terrorism and human rights violations

In recent years the contentious point whether or not torture, certain terrorist activities, apartheid and other offences should be applicable to universal jurisdiction found a great support from scholars and practitioners.²⁰⁶

A development in treaty law has emerged which does not limit the application to offenses committed by the nationals of state parties to those treaties. Therefore the use of universal jurisdiction was expanded. There are a number of multilateral treaties which oblige state parties to prosecute and extradite offenders who have committed crimes prohibited by this treaty.

The Convention against Torture from 1984, for instance, provides a clear form of the application of universal jurisdiction in Articles 4 to 7.

In the Princeton Principles it is stated that the crimes of piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture are serious crimes under international law and are subject to universal jurisdiction.²⁰⁷

²⁰⁵ Article 2 Geneva Convention, 1949

²⁰⁶ Randall, 1988: 815

²⁰⁷ Macedo, 2001

6.3 The controversy of universal Jurisdiction

The controversy of universal jurisdiction has two dimensions.

On the one side the judicial direction: Is the use of universal jurisdiction already determined by customary law for the mentioned crimes? Are head of states immune to universal jurisdiction?

On the other side the political direction: Could the application of universal jurisdiction jeopardize international relations? And how should one interfere with a state's sovereignty.²⁰⁸

In February 2009, for example, the Group of African States requested to include an additional item on the "Abuse of the principle of universal jurisdiction" in the agenda of the 63d session of the United Nations General Assembly. Ever since this request was accepted, universal jurisdiction has been debated at various sessions of the United Nations General Assembly. Governments were asked to submit observations and information on state practice of universal jurisdiction in 2010 and 2011.²⁰⁹

A state has to justify its judicial activities internationally if it prosecutes someone from a foreign state. Politically a state has to maintain cordial ties with foreign states. However, trials based on universal jurisdiction could lead to conflicts.²¹⁰

6.3.1 Immunity of head of states

A difficult aspect is the immunity of representatives or head of states. As they are not subject to universal jurisdiction, their conviction is hindered. As we have seen on many occasions, those are the ones committing the worst crimes, have the knowledge about it or could prevent the crimes and just stand by ignoring them. It is therefore difficult to bring the heads of states to justice.

One ought to mention that immunity should protect state officials, but should by no means grant impunity. An example is the Pinochet case, where it was decided that a state official is not immune from prosecution for acts of torture, because these are acts that cannot be viewed as part of an official's role.

²⁰⁸ Adeno, 2009: 150

²⁰⁹ Yee, 2011: 519

²¹⁰ Adeno, 2009: 150

Therefore to not rely to the immunity of head of states in universal jurisdiction cases will not create abuse of political positions or legal standing.²¹¹

6.3.2 Interference into a state's sovereignty

States take judicial action in order to respond to crimes committed by individuals. Jurisdiction is a manifestation of the sovereignty of a state. In order to fall under a states' jurisdiction, crimes have to be committed within the prosecuting states' territory or the perpetrator or the victim has to have the nationality of this state. Universal jurisdiction is an exception to that rule; it does not need any connection to the perpetrator or the crimes committed.²¹²

Therefore the exercise of universal jurisdiction can infringe a state's sovereignty. Consequently, this can lead to a destabilization of international relations.²¹³

6.3.3 Interference into a state's self-determination

Other critics claim that the concept of universal jurisdiction is inherent. They say the principle of self-determination is not respected. Thus its application could lead to political conflicts. Another problem with the principle of self-determination is that, the application of universal jurisdiction, one political community can interfere with the decisions of another political community. Thus a politically stronger state can pressure a politically weaker state or a politician. The courts of single states therefore make international politics. Consequently, this can lead to fatal outcomes in international relations. Opponents of the principle of universal jurisdiction expressed concern of judges' arbitrariness in the prosecution of perpetrators of the crimes subject to universal jurisdiction.²¹⁴

6.4 Conclusion

Compared to the International Criminal Court the principle of universal jurisdiction is a decentralized tool to prosecute core international crimes. As already mentioned, there are many supporters as well as opponents of the use and implementation of universal jurisdiction.

²¹¹ Morrison & Weine, 2010: 9

²¹² Berg, 2010: 65f

²¹³ Yee, 2011: 527

²¹⁴ Slaughter, 2004: 168

It is a successful weapon to fight impunity of human rights abuses and to promote human rights. Certain crimes affect us all. The international community is obliged to penalize those crimes against humanity.

States have a duty to enact and implement universal jurisdiction norms into their national laws. It is desirable that it is not seen as a neo-imperialist way pressuring states into doing so. Also, it is important that universal jurisdiction is acknowledged worldwide as a useful tool preventing atrocities.

Summoning up, the Spanish judge Baltasar Garzon states that

*“Universal Jurisdiction should not be seen as a way to limit national sovereignty, it is not an aggression against national criminal law; instead it is a way to fight impunity parallel and complementary to national criminal law.”*²¹⁵

In order to better understand the principle of universal jurisdiction I will describe the case of Hissène Habré in the next chapter. By means of this case I will point out the difficulties universal jurisdiction has to face. The Zardad case will demonstrate a best practice example of this principle.

²¹⁵ Palombo, 2011

7 The case of Hissène Habré

In this chapter the case of Hissène Habré will be described and its problems laid out. This case is an example of the use of the universal jurisdiction and a Government's resistance to implement its obligation under the Convention Against Torture to establish this principle.²¹⁶

7.1 The background of the Habré case

Hissène Habré was the president of Chad between 1982 and 1990. He took power of the former French colony of Chad by a coup d'état in 1982. Mr. Habré was leading a cruel one-party regime. Various ethnical groups, such as the Sara, the Hadjerai or the Zaghawa, were the targets of widespread abuse and killings when their leaders threatened Habré. Just before he was overthrown by Idris Déby in December 1990, 300 political prisoners were allegedly killed at the president's headquarter.²¹⁷

The following president Idriss Deby, accusing the Habré regime of thousands of murders and systematic torture, established a special truth commission. Furthermore he was accused of stealing 4.26 million dollars from the national treasury just before he fled the country into his exile in Senegal. The *Direction de la Documentation et de la Sécurité (DDS)*, the national security service of the Habré regime, with its dreaded "Special Rapid Action Brigade", carried out all those atrocities. The new government neither charged Habré for the crimes committed nor did they pursue his extradition from Senegal. It was the Chadian Association of Victims of Political Repression and Crime (AVPRC) who compiled a report of 792 victims.²¹⁸

7.2 The case

Delphine Djiraibe, president of the Chadian Association for the Promotion and Defense of Human Rights (French: Association Tchadienne pour la Promotion et la Défense des Droits de l'Homme, ATDPH), asked the NGO Human Rights Watch in 1999 to assist them in prosecuting Hissène Habré in Senegal.

One ought to mention that Senegal is one of the best functioning democratic country in Africa. It played a leading role in promoting international rights in Africa. For exam-

²¹⁶ Nowak & McArthur, 2008: 289

²¹⁷ Brody, 2001: 321

²¹⁸ Brody, 2001: 322f

ple it was the first country to ratify the International Criminal Court treaty and many other human rights treaties. It therefore it seemed imaginable that a prosecution of Hissène Habré could end successfully in Senegal.²¹⁹

On Delphine Djiraibes' request international researchers met with the members of the Association of Victims (AVPRC) secretly in Chad and gained insight to all their prepared and hidden documents from 1991. A coalition was formed consisting of Chadian-, Senegalese- and international non- governmental organizations and lawyers. Their task was to represent the victims. They brought the case before the Dakar Regional Court (French: Tribunal Régional Hors Classe de Dakar) as a private prosecution. This coalition accused Habré of torture and crimes against humanity in their complaint. The charges were based on a Senegalese statute, the United Nations Convention against Torture, ratified by Senegal in 1986, and the customary international law obligation to prosecute crimes against humanity.²²⁰

The investigating judge, Debar Kandji, was presented files of 97 political killings, 142 cases of torture, 100 "disappearances" and 736 arbitrary arrests. He received the reports of a French medical team. Some documents proved that the *Direction de la Documentation et de la Sécurité (DDS)* was under the direct supervision of Hissène Habré. Victims could testify in front of the judge. On 3 February 2000 Judge Kandji indicted Hissène Habré as an accomplice to torture. He placed him under house arrest, enforced movement restrictions on him and opened an investigation for crimes against humanity.²²¹ For the first time in history an African court charged an African citizen from another country with the presented atrocities. Shortly after, in July 2000 the Appeals Court annulled the charge against Mr. Habré as the Senegalese courts cannot try a foreign person for torture committed outside Senegal, as explained in the next sub-chapter.²²²

7.2.1 Obstacles from then onwards

Judge Kandji, who was familiar with human rights law, was eliminated from the investigations on 3 July 2000 and transferred as assistant state prosecutor at the Dakar Court of Appeals. Reed Brody states that

²¹⁹ Brody, 2001: 323.

²²⁰ Brody, 2001: 323f

²²¹ Brody, 2001: 326f

²²² Duffy & Brody, 2001: 817

*"there can be no doubt that his transfer was a reprisal for his handling of the Habré case."*²²³

On 4 July 2000 the indicting chamber dismissed the charges against Mr. Habré, reasoning that Senegalese courts do not have the competence, as the crimes were not committed in Senegal. The Association of Victims handed in an appeal to this decision. The dismissal had harsh international reactions. Consequently the government of Chad expressed its disappointment of the dismissal in July 2000 and founded the International Committee in order to continue investigations for the trial of Hissène Habré. Therefore victims filed complaints against members of the DDS directly in Chad.²²⁴

In April 2001 the Senegalese president Wade gave Habré the permission to leave Senegal within one month. However the United Nations Committee Against Torture, on the other hand, demanded Senegal as an interim measure to prevent Hissène Habré from leaving the country except under the terms of an extradition demand. Senegal followed the request and did not allow Habré to leave the country.²²⁵

7.3 States and others involvement in the case

7.3.1 Belgium and the Habré case

The dismissal of the charges in Senegal initiated other victims, including three Belgian citizens, to file a case in Belgium. Their goal was to extradite Hissène Habré there. At that time Belgium had incorporated the principle of universal jurisdiction in its national law. One ought to mention that this law was repealed in July 2003. However, this change had no effect on the ongoing complaint, as the investigations had started and there were Belgian citizens under the plaintiffs.

The judge Daniel Fransen of the Brussels district court who was in charge of the complaint visited Chad in the beginning of 2002, to interview witnesses and to visit the scenes of the alleged crimes. On 19 September 2005 he issued an international

²²³ Brody, 2001:329

²²⁴ Brody, 2001: 330f

²²⁵ Human Rights Watch, 2007: 6

arrest warrant against Hissène Habré and asked for his extradition from Senegal to Belgium.²²⁶

7.3.2 African Union and the Habré case

The extradition request was welcomed by former UN Secretary-General Kofi Annan, the Chairman of the African Union Commission Alpha Oumar Konaré and the special rapporteur of the UN Commission on Human Rights on torture and other cruel, inhuman, or degrading treatment or punishment Manfred Nowak.

Hissène Habré continued to spend his allegedly stolen money to influence the Senegalese society to support him. On 15 November 2005 Mr. Habré got arrested in Senegal. However, on 25 November 2005 the Chamber of the Court of Appeals of Dakar decided upon the recommendations of the state prosecutor, that it had no jurisdiction to this extradition request. The reasons stated were that Hissène Habré was a former head of state.

Shortly afterwards the Senegalese interior minister forwarded the case to the Presidency of the African Union, as he believed the competence to force jurisdiction in the Habré case was theirs. In that matter the African Union installed a Committee of Eminent African Jurists (CEAJ) in early 2006. In the meantime the Belgian government was still waiting for a response on the extradition request of the Senegal government. It noted it would plead on the regulations of the UN Convention Against Torture that provides for arbitration and recourse to the International Court of Justice.²²⁷

In a decision on 17 May 2006 the UN Committee Against Torture claimed that Senegal has violated Article 5 (2) of the United Nations Convention against Torture as it has failed to establish legislative measurements to exercise universal jurisdiction. Furthermore Senegal violated the 'aut dedere aut judicare' provision on the grounds of Article 7 of the UN Convention Against Torture. The UN Committee Against Torture demanded from Senegal to either prosecute Hissène Habré or, if this cannot be done, to extradite Mr. Habré to Belgium.²²⁸

²²⁶ Human Rights Watch, 2007: 6f

²²⁷ Human Rights Watch, 2007: 7f

²²⁸ Human Rights Watch, 2007: 8f

In its report on the African Union summit in July 2006 the CEAJ came to the conclusion that Senegal, under the UN Convention Against Torture is obliged to comply with its provisions. It ought to exercise jurisdiction over Hissène Habré as he is situated within Senegal's territory. Consequently the African Union requested Senegal to prosecute Hissène Habré in Africa. The Senegalese president Abdoulaye Wade accepted this decision. In November 2006 the Senegalese government annotated that it will revise its laws and forms a governmental judicial commission to permit the trial against Hissène Habré. It further noted that the government intended to introduce a witness protection program and raise money for the trial.²²⁹

7.3.3 Senegal and other stakeholders in the Habré case

In January 2007 the Senegalese National Assembly adopted a national law allowing the prosecution of the crimes of genocide, crimes against humanity, war crimes and torture, even if they occurred outside Senegal. In July Cheikh Tidiane Sy, the Minister of Justice of Senegal announced that the trial will be held before the criminal trial court (Cour d'Assises). Switzerland and France announced they would assist Senegal in the investigations and the trial.²³⁰

In February 2009 Belgium filed an application to the International Court of Justice to extradite Hissène Habré. Belgium argued that Senegal had violated the *aut dedere aut judicare* provision of the UN Convention Against Torture. Therefore the ICJ obliged Senegal to wait for its final judgment before allowing Habré to leave the country.

In 2008 and 2009 Senegal threatened with the expulsion of Habré unless it received the funding of 66 million Euros. In negotiations between the European Union and the African Union with President Wade a budget of 8.6 million Euros was eventually agreed upon.

In November 2010 the Court of Justice of the Economic Community of West African States (ECOWAS) demanded Senegal to put Habré before a special or ad hoc tribunal of an international character.²³¹

²²⁹ Human Rights Watch, 2007: 9f

²³⁰ Human Rights Watch, 2009

²³¹ FIDH, 2011

In December 2010 President Wade wanted the case to be taken back from the African Union. He stated he could not deal with Habré anymore. The UN Committee against Torture then reminded Senegal of its obligation to the *aut dedere or aut iudicare* principle.

On 4 February 2011 - President Wade said:

"Now, the chairman of the African Union Commission [says] we have to create a new jurisdiction, based on I-don't-know-what principle, to try Hissène Habré. I said stop. For me, it's over. I am no longer seized of this case. I am giving him back to the African Union."

In May 2011 Senegal walked out of the meeting again, even though they had agreed on the creation of an ad hoc International Court to try Hissène Habré with the African Union some weeks before. The Committee against Torture again reminded Senegal of its obligation to prosecute or extradite Hissène Habré according to Article 7 (2) of the UN Convention against Torture.²³²

7.4 The case today

The result of the meeting and the agreement of Senegal to establish an ad hoc International Court to try Hissène Habré was a defeat in the decade long ongoing process in prosecuting the former Chadian dictator. Consequently Belgium again requested the extradition of Hissène Habré in order to keep up the hopes of the Victims and Human Rights Groups to bring him to justice. As Jacqueline Moudeine, member of the Association for the Promotion and Defense of Human Rights (ATPDH), stated, some people would have preferred a trial in Africa.²³³

On 5 December 2011 Jacqueline Moudeine, a lawyer of Habrés victims, was awarded the Right Livelihood Award (an alternative to the Nobel Prize) "for her tireless efforts at great personal risk to win justice for the victims of the former dictatorship in Chad and to increase awareness and observance of human rights in Africa."²³⁴

Finally, the International Court of Justice concluded the public hearings in the case Belgium v. Senegal on 21 March 2012. The date for the judgment has not yet been

²³² FIDH, 2011

²³³ FIDH (a), 2011

²³⁴ Human Rights Watch, 2011

confirmed. The judgment could result in a binding legal order compelling Senegal to extradite Hissène Habré to Belgium in case it does not prosecute him. This would be a great success for Belgium and set precedence for universal jurisdiction.²³⁵

7.4.1 Challenges in the Habré case

The long ongoing and complicated process in the trial to prosecute Hissène Habré faces various challenges.

- Firstly, many survivors of the regime have already died. Important witnesses are therefore fading the longer the trial takes.
- Another challenge lies in the financial and logistical aspect. The investigations, the visits to Chad, the salaries of the personnel and the analysis of the DDS documents cost million Euros (to name just a few costs). Even with a mutual legal assistance from the Belgian state, these costs are a big burden.
- Since it is very difficult to hear hundreds of witnesses and experts, coming from Chad and other countries, security issues have to be considered.²³⁶
- Language barriers, lack of experience of the prosecutors in a domestic court with international crimes, the requirement of understanding the historical and political context and other challenges have to be accepted by the country's domestic court. For example, Belgium has created a special police unit dealing exclusively with international crimes. They are investigating in various countries, such as Rwanda, Guatemala or Burma. Other European countries also created police and prosecution units specialized to trans-national crimes.²³⁷
- Expert training for the police and prosecution authorities is necessary, especially in dealing with complex investigations in international crimes. The code of criminal procedure must provide for the prosecution of extraterritorial crimes. Crimes of the ICC statute ought to be implemented in the national

²³⁵ ICJ-CIJ, 2012

²³⁶ Human Rights Watch, 2007: 11f

²³⁷ Human Rights Watch, 2007: 12f

criminal code. Senegal has not included crimes against humanity in its criminal code until today.²³⁸

7.5 Conclusion

The case against Hissène Habré invoked universal jurisdiction in two countries, Senegal and Belgium. It is a long ongoing process to bring justice to victims of the Habré regime. Senegal's first dismissal in 2000 of the case moved victims to seek justice as well in their home country Chad, but without success with the new regime.²³⁹

Belgium's involvement in the case provoked worldwide attention and pressured Senegal to prosecute Habré. Chad was also pressured to cooperate with Belgium and therefore unlimited access to the DDS archives was granted. Chad lifted Hissène Habré's immunity from prosecution in 2002. Senegal amended its laws in 2007 and permitted to prosecute cases of genocide, crimes against humanity, war crimes and torture even when committed outside the territory.²⁴⁰

The Habré case is a very complex example of the use of universal jurisdiction. Its success is still waiting to be accomplished, either through a final judgment from Senegal, which constantly resists applying universal jurisdiction, or an extradition to Belgium and a trial there. Chad never requested Habré's extradition from Senegal.

A positive outcome was the modification of the Senegalese criminal procedure code, which permitted to bring the charges against Hissène Habré forward. Furthermore the case showed the willing cooperation between states and other stakeholders as the African Union and the European Union in terms of financial, organizational and legal matters.

²³⁸ Human Rights Watch, 2007: 13f

²³⁹ Panáková, 2010: 70f

²⁴⁰ Panáková, 2010: 70f

8 The case of Faryadi Sarwar Zardad

In contrast to the Habré case the Zardad case, which was brought before British authorities, is a best practice example for the use of universal jurisdiction. Manfred Nowak states this in his book “Universal human rights and extraterritorial obligations”. Faryadi Sarwar Zardad was an Afghan warlord, who was convicted in 2005 by the Central Criminal Court in London to 20 years imprisonment for conspiring to torture and other crimes committed in Afghanistan. The reasons leading to the case and the best practice example of universal jurisdiction will be listed below.²⁴¹

8.1 Background of the case

8.1.1 The conflict of Afghanistan between 1978 and 2001

Afghanistan suffered from many conflicts between 1978 and 2001. The time after the US invasion in 2001 will not be discussed, as it would exceed the frame of this thesis. Also, it is not essential in order to understand the case.

In April 1978 a communist government came to power in Afghanistan through a coup d'état. This led to the first series of conflicts leaving more than a million Afghans dead. The newly formed government turned against the resisting population with violence. This led to human rights abuses, many people seeking refuge and a newly formed armed resistance movement - the Mujahedeen (also called the holy warriors).²⁴²

In late 1979 the Soviet Union invaded Afghanistan. By 1986 around five million refugees were counted by the UNHCR, mostly in the neighboring countries Pakistan and Iran.

In 1989 the Soviet Union withdrew its troops from Afghanistan. Mohammed Najibullah led the new regime. However, fights between the regime and the Mujahedeen, the Afghan opposition force, continued. In 1992 the Mujahedeen entered Kabul and killed president Najibullah. It was at this point in time when the Taliban emerged,

²⁴¹ Nowak, 2010: 22

²⁴² Ruiz, 2004: 1

which consequently led to conflicts between the educated elite and the fundamentalist Islamic party.²⁴³

8.1.2 Zardad's role in the Afghanistan conflict

Faryadi Sarwar Zardad (aka Zardad Khan) was a warlord fighting for the Islamic party and paramilitary group of Gulbuddin Hekmatyar, a Mujahedeen leader. Since 1992 Zardad was in control of a route between Kabul and Pakistan. Under his command thousand men were torturing, terrorizing and killing civilians. As the Taliban came to power in 1996 the Afghan militia commander Zardad sought asylum in the United Kingdom under a fake name, living in the south of London. He was arrested in July 2003 and since Afghanistan did not apply for his extradition, the U.K. government decided to prosecute Zardad.²⁴⁴

8.2 The case

Attorney General Lord Goldsmith, the United Kingdom government's top law officer and prosecutor of the Zardad trials explained that Britain had decided to try the case, as the crimes committed were so "merciless" and such "an affront to justice" that they could be tried in any country.²⁴⁵

He also stated that

"an international convention and English law allow the trial in England of anyone who has committed torture or hostage-taking".²⁴⁶

The United Kingdom ratified the United Nations Convention against Torture in 1988. For that reason the crime of torture as an international crime was introduced by the Criminal Justice Act in the British Penal Code under section 134. This according to Article 4 of the UN Convention against Torture:

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

²⁴³ Ruiz, 2004: 2

²⁴⁴ Trial, 2011

²⁴⁵ BBC, 2005

²⁴⁶ BBC, 2005

*2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.*²⁴⁷

The obligation to prosecute a perpetrator of torture in the United Kingdom, even though the acts of torture were committed outside their territory results from Article 5 (2) and Article 7 of the UN Convention Against Torture.²⁴⁸

Article 5 (2) of the UN Convention Against Torture states that:

*Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.*²⁴⁹

According to Article 7 (1) of the UN Convention Against Torture the United Kingdom has an obligation to extradite or prosecute if no request for extradition is being received. This did not happen in the Zardad case.

Article 7 (1) of the UN Convention Against Torture states that

*The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.*²⁵⁰

Therefore, on 9 October 2004 Faryadi Sarwar Zardad was brought to trial before the Central Criminal Court England and Wales in London, known as the Old Bailey. Witnesses were present in London and a video link with witnesses at the British Embassy in Kabul was set up. Zardad's indictment included the crimes of torture, hostage taking and conspiracy to those two crimes. He pleaded not guilty. The case was deferred to 8 June 2005, as the jury could not reach a decision at the given point in time. In the second round the jury had new evidence, which was not available to the first jury. They came to the conclusion that Zardad committed the crimes of torture

²⁴⁷ Article 4, UN Convention Against Torture, 1984

²⁴⁸ Trial, 2011

²⁴⁹ Article 5 (2), UN Convention Against Torture, 1984

²⁵⁰ Article 7 (1), UN Convention Against Torture, 1984

and hostage taking in Afghanistan in the early nineties. On 19 July 2005 he was sentenced to 20 years in prison. Zardad appealed against it but was unsuccessful.²⁵¹

8.3 Challenges of the case

This trial was the first case based on the principle of universal jurisdiction in the United Kingdom. The prosecution pursuant to section 134 of the Criminal Justice Act was the first successful conviction for the crime of torture committed outside Great Britain's territory. This is why the judge had to deal with unprecedented legal rulings within English Law.

8.3.1 Juries knowledge of universal jurisdiction

In England and Wales juries handle criminal trials. It is therefore important that the prosecutor ensures that the jury understands the context of a universal jurisdiction case. The jury must also be informed about the history, culture and customs and why they are hearing evidence of another country, such as Afghanistan. They must understand the context of the witnesses.²⁵²

8.3.2 Was Zardad a “public official”?

In the first trial on 7 April 2004 the defense of Zardad omitted that he was not „a public official or a person acting in an official capacity" in terms of Section 134 (1) of the Criminal Justice Act 1988. Even though he was not a public official “de jure”, the judge nevertheless clarified that Zardad should be treated as one on a “de facto” basis.

The judge reaffirmed this stating different decision with similar outcomes:

- the UN Committee Against Torture decisions: *Elmi v Australia and HMHI v Australia*,
- the ITCY case: *Furundzija* and
- the USA case: *Kadic v Karadzic*.²⁵³

²⁵¹ Trial, 2011

²⁵² Redress, 2010: 40f

²⁵³ Redress, 2005

8.3.3 Admissibility of video identification

Another important point was the problem of the admissibility of video identification procedures. British Law demands a high standard of evidence. In the Zardad case many witnesses and documents were situated in Afghanistan. Evidently, it was a practical problem to use this evidence against Mr. Zardad. Three hours' time difference, the expensive cost of the investigations and the visits of Scotland Yard detectives to the crime scenes point this out.²⁵⁴

The British national coordinator of terrorist investigations remarked that:

*"[i]t was a huge challenge, in the prevailing circumstances in Afghanistan, to investigate and find evidence to the standard demanded by the British courts".*²⁵⁵

The British Immigration and Nationality Directorate did not grant UK visas to the witnesses based in Afghanistan, as they feared they would be claiming political asylum once entering the United Kingdom. Therefore the live video link was the only way to get to the evidence needed. By this mean the context of the conflict in Afghanistan and the way in which Zardad was working out his powers was explained. Section 32 of the UK Criminal Justice Act allows evidence to be presented via video link from outside the courts' room. Therefore 40 witnesses could give evidence in the first trial via the live link from Kabul. In the second trial key witnesses were flown to London to appear before the judge in person. The judge concluded it was essential that this kind of evidence came at first hand. Other witnesses were again questioned via the live link.²⁵⁶

8.4 Conclusion

As explained, the Zardad case is a best practice example of the application of universal jurisdiction of a crime under international law. Firstly the case was quickly closed and Zardad was imprisoned to 20 years. Secondly it shows how the cooperation between states can work effectively. Lastly it illustrates how new means, such as live-link, can be a useful way of providing evidence.

²⁵⁴ Berg, 2010: 376

²⁵⁵ Berg, 2010: 376

²⁵⁶ Redress, 2010: 41

The question arises if the methods for the application of universal jurisdiction, as showed in the Zardad case, are too expensive and complicated to be justified.

The British authorities invested three million pounds in order to collect evidence before bringing him to trial in 2004. Afghanistan and the United States showed a willing cooperation, according to the mutual judicial assistance obligation (Article 9 CAT).²⁵⁷ In order for witnesses to give evidence via live link, British police officers had to fly to Afghanistan weeks before the start of the trial to prepare the satellite link with the ICC from the British Embassy in Kabul. Those officers also controlled the names and identities of the witnesses and explained the process to the witnesses. They stayed in Kabul throughout the trial to help the witnesses and to ensure that the quality of the life link is satisfactory. The costs of the life link equipment were about £150,000 and the satellite time cost around £60,000 per day of the trial.²⁵⁸

In my point of view, the costs played an essential role of the amendment of the British universal jurisdiction law in 2010 through the Police Reform and Social Responsibility Act, as explained in chapter 6.2.5.1.1. Nowadays private individuals are required to obtain the consent of Britain's director of public prosecutions to file a complaint for human rights offences.

If, however, the use of the live link is the best way of securing the co-operation of the witnesses and their evidence, the financial cost is justifiable, in my point of view. The jurors of the court in Old Bailey had to deal with a completely new situation, but managed to make a decision, which brought Zardad to justice and 20 years of imprisonment for committing the crime of torture.

²⁵⁷ Nowak, 2010: 22f.

²⁵⁸ Redress, 2010: 42

9 Discussion

In this chapter I am going to discuss and analyze the main points of my thesis. I will refer to the already described case studies and give answers to my research questions.

9.1 What are the main advantages and disadvantages of the International Criminal Court?

9.1.1 Advantages of the ICC

- The ICC has formally ***developed and uniform standards***. On the one hand the Rome Statute defines the rules for the court's jurisdiction, function and structure. The rules of procedure and evidence of the ICC on the other hand are instruments for the application of the Rome Statute. They determine further rules to ensure high standards of the court's work, which one has to read in accordance with the Rome Statute. This gives states the security of knowing what to expect and what they are obliged to do once they have ratified the Rome Statute.²⁵⁹
- The ICC is an ***independent international institution***. Therefore judges are independent and trials are not biased. Thus it is less vulnerable to accusation playing politics.²⁶⁰
- The ICC is a ***permanent court***. Therefore it is an organized institution with experienced staff. The ICC's staff is specialized in investigating and bringing persons accused of the most serious crimes of international concern to justice. Setting up ad hoc tribunals, such as the International Criminal Tribunal for Rwanda, is a long-lasting and politically disputed process. Setting up these tribunals can be avoided through the establishment of the ICC.
- The ICC has **constant financial means** through contributions from state parties of the Rome Statute. This ensures adequate financial means necessary to efficiently investigate and bring criminals to justice.

²⁵⁹ ICCLR, 2003

²⁶⁰ Ministry of Foreign Affairs (Netherlands), 2011

9.1.2 Disadvantages of the ICC

- **Limited jurisdiction:** The International Criminal Court can only exercise jurisdiction as defined by the Rome Statute and therefore only over certain perpetrators. A suspect must be from a member state party and can only be accused of the crime of genocide, crimes against humanity, war crimes and aggression.
- **Ineffective enforcement mechanisms:** The ICC has no police force of its own. It therefore has to rely on the cooperation of states, their national police service as well as the assistance of the organizations Europol and Interpol, in order to arrest perpetrators and transfer them to The Hague. The case of Omar Al-Bashir clearly highlights the difficulties regarding this point; many signatory states of the Rome Statute did not comply with its rules and refused to extradite him. For example Bashir visited Chad in 2010, which denied this.²⁶¹
- **Efficiency:** It took the International Criminal Court ten years until it managed to convict the first criminal, namely Thomas Lubanga on 14 March 2012.

9.2 What are the main advantages and disadvantages of universal jurisdiction?

9.2.1 Advantage of universal jurisdiction

- **Broad jurisdiction:** Universal jurisdiction has jurisdiction over everyone who commits grave crimes of international concern. Therefore universal jurisdiction applies to many more crimes than the four crimes defined in the Statute of the International Criminal Court.
- **No capacity overload** of particular courts. The accused person can be prosecuted in whichever country has the capacity. It is not limited to any connection requirement, except the presence of the perpetrator in that particular state. Therefore a court that is unable to prosecute the criminal can extradite the accused to any foreign country willing to host the trial.

²⁶¹ BBC, 2011

9.2.2 Disadvantage of universal jurisdiction

- ***Municipal tribunal:*** Under the principle of universal jurisdiction municipal tribunals host the prosecution of violations of international crimes. Due to the distance to the actual events these national tribunals often lack sensibility. Evidently, a judge is unable to fully understand the situation at the scene of crime, often many hundred miles away. Access to evidence and information is limited due to the distance between the tribunal and the crime scene. Staff might have less knowledge of international criminal law and often has to be trained. It is therefore difficult to handle universal jurisdiction cases before municipal courts.
- ***No uniform universal jurisdiction law:*** Another disadvantage is the lack of uniform procedure and punishment regulations. Each country defines the crimes and circumstances within which universal jurisdiction may apply differently. “Universal Jurisdiction is actually under reconstruction,” said Garzon. “The United Nations General Assembly is elaborating a universal jurisdiction statute to clarify a concept that has been used in very different ways,” and he continued, “restricting universal jurisdiction is not necessarily a bad idea if such restriction is followed by a strict cooperation with the International Criminal Court system.”²⁶²
- ***No regulated financial means:*** The prosecuting state has to pay for the process, which is usually very expensive. Witnesses might have to be flown to the tribunals, evidence has to be collected and means of communicating, such as the live-link in the Zardad case, have to be paid.

9.3 How can both systems serve international justice?

The International Criminal Court and universal jurisdiction deal with similar crimes. However, universal jurisdiction goes beyond the crimes defined in the Rome Statute. Universal jurisdiction is exercised unilaterally by a single state. The jurisdiction of the ICC, however, is an independent international organization to which states delegate

²⁶² Palombo, 2011

the authority to enforce international law. Occasionally, the ICC and national courts may have jurisdiction over the same cases.

Supporters of universal jurisdiction believe both systems should complement each other and should therefore be working side by side. This would improve international justice as states are provided with more choices on how to deal with perpetrators of international crimes. If one system does not apply, the other one could bring the perpetrator to justice. This would be the right approach to end impunity.²⁶³

Therefore, as Mr Ryngaert has emphasized, the ICC could target on higher-ranking perpetrators, whereas lesser perpetrators could be brought to justice by the state in which they sought refuge (in case the state of nationality does not initiate an investigation itself). As already explained, these states are obliged to prosecute the accused persons, as long as the suspect is present. Nevertheless, the International Criminal Court could play a supporting role. As stated in Article 93 of the Rome Statute, the ICC could help by transmitting documents or other types of evidence received by the Court.²⁶⁴

9.4 What is the future of each system?

In the days before the International Criminal Court came into existence, universal jurisdiction was even more important than it is today. This was simply because it was the only international tool to prosecute perpetrators of atrocities.

In order to stay viable, the ICC must strengthen and expand its enforcement mechanisms. There is a need for repercussions in the Rome Statute. Member States to the Rome Statute should be forced to comply with their duties. This could be done by the enforcement mechanisms of suspension, expulsion or referral to the UN Security Council for sanctions.²⁶⁵

9.4.1 Challenges of universal jurisdictions in the domestic legal systems

Today, the challenges in domestic legal systems could be overcome if the obligation to prosecute crimes such as torture or genocide becomes internationally recognized.

²⁶³ Khojasteh, 2007

²⁶⁴ Ryngaert, 2009: 509f

²⁶⁵ Barnes, 2011

The European Union has encouraged states to fight impunity by the recommendation of creating specialized units to prosecute international crimes. Many Western European states, as for instance Belgium, the United Kingdom or Germany, have already put obligations towards universal jurisdiction into practice. This movement could lead the way in which universal jurisdiction works as an effective tool to fight impunity.²⁶⁶

In order to prosecute criminals under universal jurisdiction all states ought to incorporate these crimes of international concern into their national legislation. This is in fact a legal obligation.²⁶⁷

9.4.2 Further ratifications of the Rome Statute to promote the ICC's work

Finally, as many states as possible should be convinced to ratify the Rome Statute to make its scope universally. Promoting the ratification of the ICC's statute into domestic legislation and thus incorporating all crimes over which the ICC has jurisdiction, is therefore essential. As shown in the cases, the political will is also a crucial point in the struggle for prosecution.²⁶⁸

²⁶⁶ Human Rights Watch, 2006

²⁶⁷ Human Rights Watch, 2007: 10

²⁶⁸ Brody, 2001: 334

10 Conclusion

Both the International Criminal Court and the principle of universal jurisdiction are useful tools to approach the goal of international justice and deter future war criminals.

To my mind, the ideal way of handling the two systems would be through close cooperation. Both jurisdictions are not mutually exclusive. The UN General Assembly is currently working on standards of the scope and application of the principle of universal jurisdiction. Although many such standards have already been elaborated through treaties and customary international law, a catalogue of restrictions and set procedures of universal jurisdiction might finally lead to the principle of universal jurisdiction being acknowledged internationally.

If states approve both systems they might come to terms with the idea that it is their own responsibility to prosecute crimes before their national courts. Under the principle of complementarity, which is one of the main principles of the International Criminal Court, the territorial state has the priority to prosecute a criminal; given it has an independent and effective judicial system. It might also seem for some countries a motivation to prosecute its own people at their national courts, rather than to have them prosecuted in another country through universal jurisdiction or in The Hague through the International Criminal Court. In my opinion it is therefore vital to strengthen the judicial systems of those countries, which want to bring their perpetrators to justice. This could work through cooperation with the International Criminal Court.

As judge Garzon recommended recently:

*“International criminal justice, national criminal justice and universal jurisdiction should cooperate in order to prosecute universal crimes that are repugnant to every nation in the world.”*²⁶⁹

In order to promote the principle of universal jurisdiction, the idea of justice has to change globally. A globalized world demands an international regime that protects human beings. Due to the globalization of the media system, for instance, we are sometimes informed about torture and human rights abuses around the world shortly

²⁶⁹ Palombo, 2011

after they were committed. We must not sit back and watch the ongoing atrocities. There is a commitment to act.

In order to end impunity of individuals committing grave crimes, provisions of international law must be enforced. As Benjamin B. Ferencz, a former Nuremberg prosecutor illustrates:

“A person stands a better chance of being tried and judged for killing one human being than for killing 100,000.”²⁷⁰

As thoroughly explained, the principle of universal jurisdiction is an important international system of justice to condemn perpetrators of the gravest crimes recognized by the international community. Though the right balance between keeping good international relations and the fight against impunity must be found. States should implement universal jurisdiction legislation and exercise it.

From June 2012 onwards Fatou Bensouda will be the new prosecutor for nine years. Many trials might be concluded in the near future. With Mrs. Bensouda in office the relationship between the African Union and the International Criminal Court will hopefully improve. Likewise, it is hoped that the ICC's mandate to eradicate impunity will be fulfilled. The international community is not willing to tolerate such inhumane acts anymore and wishes to punish the perpetrators of such atrocities.

²⁷⁰ United Nations, 1999

11 Bibliography

Adeno, A. (2009). Imaging the International Community: The Constitutive Dimension of Universal Jurisdiction. *Human Rights Quarterly* vol. 31 .

Amann, D. M. (1999). Prosecutor v. Akayesu. Case ICTR-96-4-T . *American Society of International Law*, Vol. 93, No. 1 , S. 195-199 .

Amnesty International. (2011). *Universal Jurisdiction: a preliminary survey of legislation around the world*. Abgerufen am 12. 02 2012 von <http://www.amnesty.org/en/library/asset/IOR53/004/2011/en/d997366e-65bf-4d80-9022-fcb8fe284c9d/ior530042011en.pdf>

Arieff, A., Margesson, R., Browne, M. A., & Weed, M. C. (2011). *International Criminal Cases in Africa: Status and Policy Issues*. Washington D.C.

Barnes, G. P. (2011). *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*. Fordham: Fordham International L.J.

Bassiouni, M. C. (2003). *Introduction to international criminal law (International and Comparative Criminal Law Series)*. Ardsley, New York: Transnational Publishers, Inc.

Bassiouni, M. C. (2001). *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*. Virginia: Virginia Journal of International Law Association.

BBC. (19. 07 2005). *Afghan warlord jailed for 20 years*. Abgerufen am 02. 12 2012 von http://news.bbc.co.uk/2/hi/uk_news/4695353.stm

BBC. (30. 11 2011). *BBC: Q&A: International Criminal Court*. Abgerufen am 15. 02 2012 von <http://www.bbc.co.uk/news/world-11809908>

BBC (20. 10 2011). *Sudans Omar Al Bashir in Malawi: ICC wants answers*. Abgerufen am 12. 1 2012 von <http://www.bbc.co.uk/news/world-africa-15384163>

Beckman, R., & Butte, D. (2011). *www.ilsa.org*. Abgerufen am 24. 10 2011 von <http://www.ilsa.org/jessup/intlawintro.pdf>

Behrendt, U. P. (2005). *Die Verfolgung des Völkermordes in Ruanda durch internationale und nationale Gerichte. Zugleich ein Beitrag zu Inhalt und Funktion des Universalitätsprinzips bei der Verfolgung von Völkerrechtsverbrechen*. Berlin: Berliner Wissenschaftsverlag.

Beigbeder, Y. (1999). *Judging War Criminals. The policies of international justice*. London. London: Palgrave Macmillan.

Bellinger, J. (19. 09 2011). *LAWFARE: Britain Amends Universal Jurisdiction Law*. Abgerufen am 20. 01 2012 von <http://www.lawfareblog.com/2011/09/britain-amends-universal-jurisdiction-law/>

Berg, K. J. (2010). *Universal Criminal jurisdiction as mechanism and part of the global struggle to combat impunity with particular regards to the crime of torture*. Wien: Universität Wien.

Boot, M. (2002). *Genocide, Crimes against Humanity, War Crimes: nullum crimen sine lege and the subject matter jurisdiction of the International Criminal Court*. Antwerpen: Intersentia Uitgevers.

Brody, R. (2001). The Prosecution of Hissène Habré: An „African Pinochet“ . *New England Law Review*. Vol. 35:2. , S. p. 321-335.

Broomhal, B. (2004). *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*. Oxford: Oxford University Press.

Bryman, A. (2004). *Social Research Methods. Second edition*. New York: Oxford University Press.

Calvo-Goller, N. K. (2006). *The trial proceedings of the International Criminal Court: ICTY and ICTY*. Leiden: Martinus Nijhoff Publishers.

Carvelli, S. (26. 11 2008). *The Struggle Against Impunity: The Contribution of the International Police Cooperation*. (C. U. School, Hrsg.) Abgerufen am 20. 9 2011 von <http://digitalcommons.ilr.cornell.edu/intl/73>

Chehtman, A. (2010). *The Philosophical Foundations of Extraterritorial Punishment*. New York: Oxford University Press.

Coalition for the International Criminal Court (a). (2011). *Cases and situation: Northern Uganda*. Abgerufen am 15. 10 2011 von iccnw: <http://www.iccnw.org/?mod=northernuganda>

Coalition for the International Criminal Court (b). (2011). *Cases and situations: Central African Republic*. Abgerufen am 15. 10 2011 von iccnw: <http://www.iccnw.org/?mod=car>

Coalition for the International Criminal Court (c). (2011). *Cases and situations: DRC*. Abgerufen am 15. 10 2011 von iccnw: <http://www.iccnw.org/?mod=drc>

Conway, G. (2003). *Ne bis in idem in International Law: International Criminal Law Review Vol. 3: 217-244*. Netherlands: Brunel Law School.

Coombes, K. (2011). *Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?* Cambridge: George Washington International Law Review.

Cooper, J. (2008). *Raphael Lemkin and the Struggle for the Genocide Convention*. Palgrave/Macmillan.

Dareshshori, S., & Evenson, E. (2010). *Peace, Justice and the International Criminal Court in Oxford Transition Justice Research: Debating International Justice in Africa*. Oxford. Abgerufen am 30. 10 2011 von http://www.fljs.org/uploads/documents/Justice_in_Africa.pdf

Dubois, O. (31. 12 1997). Rwanda's national criminal courts and the International Tribunal. *International Review of the Red Cross*, No. 321 .

Duffy, H., & Brody, R. (2001). Prosecuting Torture Universally: Hissène Habré, Africa's Pinochet? In H. Fischer, C. Kress, & S. R. Luder, *International and National Prosecution of Crimes under International Law*. Berlin.

Dugard, J., & Wyngaert van den, C. (1996). *International Criminal Law and Procedure*. Aldershot: Dartmouth Publishing Company Limited.

Encyclopaedia Britannica Editorial. (2010). *Encyclopaedia Britannica 2010*. London: Encyclopaedia Britannica.

Europol. (2012). *About Europol*. Abgerufen am 20. 01 2012 von <https://www.europol.europa.eu/content/page/about-europol-17>

FIDH (a). (10. 6 2011). *www.fidh.org*. Abgerufen am 25. 10 2011 von <http://www.fidh.org/Senegal-Habré-Trial-an-Illusion>

FIDH. (10. 6 2011). *www.fidh.org*. Abgerufen am 25. 10 2011 von <http://www.fidh.org/Hissène-Habré-in-Senegal-21-Years-of-Impunity>

Frau, R. (2010). *Das Verhältnis zwischen dem ständigen Strafgerichtshof und dem Sicherheitsrat der Vereinten Nationen. Art. 13 let. B9 IstGH-Statut und der Darfur-Konflikt vor dem Gerichtshof*. Berlin: Duncker&Humblot.

Frey, B. (2007). *Analyse und Verbesserungsansätze im Rahmen des Qualitätsmanagements in der Fertigung der Firma Mustermann GmbH*. München: GRIN Verlag.

Garcia, F. J. (13. 6 2005). *Globalization and the Theory of International Law*. (B. C. School, Hrsg.) Abgerufen am 10. 11 2011 von <http://lawdigitalcommons.bc.edu/lfp/93>

Hassan, S. M., & Ray, C. E. (2009). *Darfur and the Crisis of Governance in Sudan: A Critical Reader*. Cornell: Cornell University Press.

Heeck, S. v. (2006). *Die Weiterentwicklung des formellen Völkerstrafrechts. Von den ad hoc Tribunalen der Vereinten Nationen zum ständigen Internationalen Strafgerichtshof unter besonderer Berücksichtigung des Ermittlungsverfahrens*. Berlin: Dunker& Humblot.

Heinsch, R. (2007). *Die Weiterentwicklung des humanitären Völkerrechts durch die Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda. Zur Bedeutung von internationalen Gerichtsentscheidungen als Rechtsquelle des Völkerstrafrechts*. Berlin: Berliner Wissenschaftsverlag.

Human Rights Watch. (2007). *The Trial of Hissène Habré: Time is Running Out for the Victims*. Abgerufen am 20. 10 2011 von www.hrw.org/en/reports/2007/01/26/trial-hiss-ne-Habré

Human Rights Watch. (12. 2 2009). *Chronology of the Habré Case*. Abgerufen am 25. 10 2011 von <http://www.hrw.org/news/2009/02/12/chronology-habr-case>

Human Rights Watch. (30. 9 2011). *Right Livelihood Award: Standing up for Victims of Chad's Ex-Dictator, Jacqueline Moudeïna, Lawyer for Habré's Victims, Gets 'Alternative Nobel Prize'*. Abgerufen am 29. 10 2011 von <http://www.hrw.org/news/2011/09/30/right-livelihood-award-standing-victims-chad-s>

Human Rights Watch. (2006). *Human Rights Watch: Universal Jurisdiction in Europe: The State of Art*. Abgerufen am 29. 10 2011 von <http://www.hrw.org/sites/default/files/reports/ij0606web.pdf>

Human Rights Watch. (2008). *Courting History: The Landmark International Criminal Court's First Years*. New York: Human Rights Watch.

ICC-CPI. (2012). Official Homepage of the International Criminal Court. Abgerufen am 13. 05 2012 von www.icc-cpi.int

ICCLR. (03 2003). *The International Centre for Criminal Law Reform & Criminal Justice Policy*. Abgerufen am 19. 02 2012 von http://www.icclr.law.ubc.ca/Publications/Reports/ICC%20Reports/RPE_2nd_ed_English.pdf

ICCNOW. (2012). *ICC-NOW*. Abgerufen am 13. 05 2012 von <http://www.iccnw.org>

ICJ-CIJ. (2012). www.icj-cij.org. Abgerufen am 15. 05 2012 von <http://www.icj-cij.org/docket/files/144/16953.pdf>

International Criminal Court Participation, C. s. (24. 6 2011). *ChartsBin.com*. Abgerufen am 31. 10 2011 von <http://chartsvin.com/view/1644>

Jurdi, N. N. (2011). *The International Criminal Court and National Courts: A Contentious Relationship*. Surrey, England: Ashgate Publishing Company.

Kaleck, W. (2009). Abgerufen am 29. 12 2010 von <http://students.law.umich.edu/mjil/article-pdfs/v30n3-Kaleck.pdf> 29.12.2010.

Khojasteh, A. (28. 06 2007). *AMICC: QUESTIONS & ANSWERS ON THE ICC AND UNIVERSAL JURISDICTION*. Abgerufen am 15. 02 2012 von <http://www.amicc.org/docs/Universal%20Jurisdiction%20Q&A.pdf>

Kissinger, H. (2001). The Pitfalls of Universal Jurisdiction. *Foreign Affairs* vol. 80 No. 4 .

Köchler, H. (2011). *The Security Council as Administrator of Justice: Reflections on the Antagonistic Relationship between Power and Law*. Vienna: International Progress Organisation.

Kraytman, Y. S. (2005). Universal Jurisdiction – Historical Roots and Modern Implications. *BSIS Journal of International Studies* Vol. 2, 2005 , S. 94-129.

Langer, M. (01 2011). The Diplomacy of Universal Jurisdiction: The political branches and the transnational prosecution of international crimes. *American Journal of International Law* .

Lowe, V. (2007). *International Law (Clarendon Law Series)*. USA: Oxford University Press.

Macedo, S. (2001). *Princeton Principles on Universal Jurisdiction*. Princeton, New Jersey: Princeton University.

Malanczuk, Peter. (1997). Akehurst's Modern Introduction to International Law. Routledge: Routledge.

McGoldrick, D., Rowe, P., & Donnelly, E. (2004). *The permanent international Criminal Court: Ilegal and policy issues*. Oregon, USA: Hart Publishing.

Megret, F. (2008). *Globalization and International Law*. Oxford: Max Planck Encyclopedia of International Law, Oxford University Press.

Ministry of Foreign Affairs Netherlands. (2011). *Minbuza.nl*. Abgerufen am 15. 02 2012 von <http://www.minbuza.nl/en/key-topics/international-legal-order/international-criminal-court>

Mitchell, J. C. (1984). "Case studies". In R. Ellen, *Ethnographic Research: A Guide to General Conduct*. . London: Academic Press.

Moreno-Ocampo, L. (8. 10 2008). *The Tenth Anniversary of the ICC and Challenges for the Future*. Von London School of Economics : <http://www.iccnw.org/documents/20081007LuisMorenoOcampo.pdf> abgerufen

Morrison, D., & Weine, J. R. (2010). Curbing Enthusiasm for Universal Jurisdiction. *Berkeley Journal of International Law*, Vol 4 .

Murungu, C., & Biegon, J. (2011). *Prosecution Crimes in Africa*. Cape Town: Pretoria University Law Press.

Nowak, M. (2010). Obligation of States to Prevent and Prohibit Torture in an Extraterritorial Perspective. In S. S. Mark Gibney, *Universal human rights and extraterritorial obligations*. Pennsylvania: University of Pennsylvania Press .

Nowak, M., & McArthur, E. (2008). *The United Nations Convention Against Torture: A Commentary*. Oxford: Oxford University Press.

Ntsebeza, D. B. (2009). The International Criminal Court in Darfur. *Peace versus Justice* .

Nuremberg Human Rights Center. (2011). From Nuremberg to The Hague – The Road to the International Criminal Court. Nuremberg: Nuremberg Human Rights Center.

Orentlicher, D. F. (2003). *Universal Jurisdiction after Pinochet: Prospects and Perils*. Washington D.C.: Washington College of Law.

Palombo, D. (08. 11 2011). *Garzon on universal jurisdiction in the international criminal arena*. Abgerufen am 12. 01 2012 von Harvard Law School: http://www.law.harvard.edu/news/2011/11/08_garzon-on-universal-jurisdiction.html

Panáková, J. (2010). Law and politics of universal jurisdiction. *Amsterdam Law Forum*.

Randall, K. C. (1988). *Universal Jurisdiction Under International Law*. Austin, Texas: Texas Law Review.

Redress. (2010). *UNIVERSAL JURISDICTION TRIAL STRATEGIES*. Abgerufen am 29. 01 2012 von A report on the Conference held in Brussels, 9-11 November 2009: http://www.redress.org/Universal_Jurisdiction_Nov2010.pdf

Redress. (2005). *Redress: R v Zardad Case Comment*. Abgerufen am 6. 2 2012 von <http://www.redress.org/downloads/news/Zardad%20Case%20Comment%2019%20July%202005.pdf>

Romano, C., & Ingadottir, T. (2000). *The Financing of the International Criminal Court: A Discussion Paper*. London: PICT.

Ross, A. (2011). *Transnational Geographies and Human Rights, in A Companion to Social Geography* (eds V. J. Del Casino, M. E. Thomas, P. Cloke and R. Panelli). Oxford, UK: Blackwell Publishing Ltd.

Ruiz, H. A. (2004). Afghanistan: conflict and displacement 1978- 2001. *Forced migration review*. 13. Oxford Department of International Development. <http://dev.wecreatedesign.co.uk/rsc-old/files/fmr13.3.pdf> .

Ryngaert, C. (2009). The International Criminal Court and Universal Jurisdiction: A Fraught Relationship. *New Criminal Law Review: An International and Interdisciplinary. University of California Press Journal Vol. 12, No. 4 , S. pp. 498-512.*

Sato, A. (2002). *The International Criminal Tribunal for Rwanda (ICTR) and its struggle against impunity : the international campaign for justice, peace and reconciliation*. Innsbruck: Universität Innsbruck.

Schabas, W. (2007). *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press.

Scharf, M. P. (2001). Application of Treaty-Based Universal Jurisdiction to Nationals of Non Party States. S. 382.

Security Council. (2007). International Criminal Court Prosecutor tells Security Council Sudan's Government "not cooperating" in Darfur Investigations. *Security Council 5789th Meeting*. New York: United Nations.

Sewall, S. B., & Kaysen, C. (2000). *The United States and the International Criminal Court: National Security and International Law*. Maryland, USA: Rowman & Littlefield Publishers.

Slaughter, A.-M. (2004). Defining the Limits Universal Jurisdiction and National Courts. In S. Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*. Philadelphia, Pennsylvania: University of Pennsylvania Press.

Slomanson, W. R. (2008). *Introductory Note on International Criminal Court: Summary of the Prosecutor's Application for Warrant of Arrest against Omar Hassan Ahmad al Bashir*. San Diego: Thomas Jefferson School of Law.

Sriram, C. L., & Suren, P. (2010). *Peace versus Justice: The Dilemma of Transitional Justice in Africa*. University of KwaZulu-Natal Press.

The Nizkor Project. (1999). www.nizkor.org. Abgerufen am 29. 12 2010 von <http://www.nizkor.org/ftp.cgi/people/e/ftp.py?people/e/eichmann.adolf/transcripts/Judgment/Judgment-002>

Tisdall, S. (11. 4 2011). *The Guardian: Omar Al Bashir: Conflict in Darfur is my responsibility*. Abgerufen am 12. 1 2012 von <http://www.guardian.co.uk/world/2011/apr/20/omar-al-bashir-darfur-responsibility>

Trial. (2011). *Trial-Watch Zardad Profil*. Abgerufen am 6. 2 2012 von <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/name/faryadi-sarwar-zardad/action/show/controller/Profile/tab/slotlight.html>

UN - Prevention of Genocide. (2011). *Rwanda: A Brief History of the Country*. Abgerufen am 27. 01 2012 von <http://www.un.org/preventgenocide/rwanda/infokit.shtml>

UNICTR (a). (2011). *International Cooperation with the tribunal*. Abgerufen am 19. 01 2012 von <http://www.unictr.org/tabid/113/default.aspx>

UNICTR (2011). *General Information of the ICTR*. Abgerufen am 30. 01 2012 von <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx>

United Nations. (1999). www.untreaty.un.org. Abgerufen am 31. 10 2011 von <http://untreaty.un.org/cod/icc/general/overview.htm>

United States of America et al v Goering et al. (1946). United States of America et al v Goering et al, International Military Tribunal, Judgement, 30 Sep- 1 Oct 1946 (1947) 41 AJIL 172.

Vertovec, S. (2000). Conceiving and researching transnationalism, *Ethnic and Racial Studies* 22(2): 445-62. *International Conference on Transnational Communities in the Asia Pacific Region: Comparative Perspectives* (S. 2000). Singapore: Castles.

Wise, E., & M.Bassiouni, M. C. (1995). *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*. Dordrecht, Boston, London: Martinus Nijhoff Publishers.

Yee, S. (2011). Universal Jurisdiction: Concept, Logic, and Reality,. *Chinese Journal of International Law* 10(3) , S. 503-530.

12 Appendix

Abstract

Ending impunity of individuals committing grave crimes, such as genocide, crimes against humanity, war crimes or torture is a concern of the international community. Therefore two international criminal law approaches to hold jurisdiction over human rights abusers evolved: The International Criminal Court and the principle of universal jurisdiction.

On 14th March 2012, a decade after it was established, the International Criminal Court convicted its first verdict and thus made an important step to become a respected global institution. Even though there are still some difficulties to overcome, the International Criminal Court bears hope for universal justice. Unfortunately, some countries still obstruct its work today. In order to make the Court more effective it is important to promote states to ratify the Rome Statute.

The principle of universal jurisdiction claims that any national legal system can prosecute perpetrators of the worst crimes of international law universally. It is a controversial tool that plays an important part besides the creation of the International Criminal Court. Needless to say, it is crucial that as many states as possible acknowledge their obligation to protect human rights.

This thesis aims to analyze the work of the International Criminal Court and the principle of universal jurisdiction. The relationship between these two permanent criminal law enforcement mechanisms will be described and ways to prosecute human rights abusers will be discussed by means of various cases. The core argument of this thesis states that both systems are not mutually exclusive and are essential for international justice. They are useful instruments to prosecute perpetrators of grave crimes of international law.

Kurzfassung

Ein großes Anliegen der internationalen Gemeinschaft ist es die Straflosigkeit von Personen die schwere Verbrechen, wie Völkermord, Verbrechen gegen die Menschlichkeit, Kriegsverbrechen oder Folter begangen haben, zu beenden. Um diesen Verbrechen entgegen treten zu können haben sich zwei internationale Gerichtsbarkeiten in den letzten Jahren etabliert, auf der einen Seite ist das die Institution des Internationalen Strafgerichtshofes und auf der anderen das Universalitätsprinzip.

Zehn Jahre nach der Gründung des Internationalen Strafgerichtshofes in Den Haag, hat dieser am 14 März 2012 sein erstes Urteil verkündet. Durch die Verurteilung von Thomas Lubanga hat der Gerichtshof international weiter an Ansehen gewonnen. Auch wenn es noch einige Schwierigkeiten zu überwinden gibt, so birgt der Internationale Strafgerichtshof Hoffnung für universelle Gerechtigkeit. Seine Schlagkraft kann sich jedoch nur dann vollständig entfalten, wenn weitere Länder das ihm zugrunde liegende Römische Statut unterzeichnen.

Auf der anderen Seite kann basierend auf dem Universalitätsprinzips jedes nationale Rechtssystem Täter der schlimmsten Verbrechen des Völkerrechts strafrechtlich verfolgen. Die Grundlage hierfür bildet jedoch neben der Anerkennung des Menschenrechts auch die Bereitschaft von Staaten diese zu schützen. Diese Art von Gerichtsbarkeit spielt eine entscheidende Rolle bei der Verfolgung und Verurteilung internationaler Straftäter, die in Staaten leben bzw. sich aufhalten die nicht das Römische Statut unterschrieben haben.

Diese Diplomarbeit richtet sich darauf den Internationalen Strafgerichtshof und das Universalitätsprinzip zu analysieren, die Beziehung zwischen diesen beiden Mechanismen zu beschreiben und die unterschiedlichen Möglichkeiten Menschenrechtsverletzter zu verfolgen anhand verschiedener Fälle zu diskutieren. Der Kern dieser Diplomarbeit ist es eine Antwort auf die Frage zu finden in wieweit sich die beiden Systeme gegenseitig ergänzen und gemeinsam einen Beitrag für internationale Gerechtigkeit leisten können. Denn ohne Frage sind beide nützliche und mittlerweile bewährte Instrumente um die Verantwortlichen von schweren Verbrechen des Völkerrechtes zu verfolgen.

Curriculum Vitae

Education

06/ 2012 Master Degree in International Development (Magistra)

University of Vienna, Austria

Coursework included: Political Economy of International Development, History, Project Cycle Management and Globalization Studies.

12/ 2010 Master Degree in Law (Magistra Juris)

University of Vienna, Austria

Coursework included: Public International Law, European Law, Philosophy of Law and Constitutional Law.

2009 Summer University Programme

London School of Economics and Political Science, London, U.K.

International Journalism & International Law

2008/2009 University Exchange Program

Universidad Carlos III, Madrid, Spain

European and Public International Law

2003 Graduated in Matura Examinations (equivalent to UK A-Level)

Klostergasse Secondary School, Vienna, Austria

Languages

German: native

English, Spanish and French: fluent

Arabic, Chinese: basic